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DOMESTIC RELATIONS

By JOSEPH WARREN MADDEN
PROFESSOR OF LAW IN THE UNIVERSITY OF PITTSBURGH

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WILLIAM REYNOLDS VANCE
GENERAL EDITOR

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†

CASES

ON

DOMESTIC RELATIONS

PART 1

PARENT AND CHILD

CHAPTER 1

THE CUSTODY, CONTROL, AND DISCIPLINE OF THE CHILD

Ex parte SKINNER.

Court of Common Pleas, 1824. 9 Moore, 278.

Mr. Serjeant Lawes, on a former day in this Term, applied for a writ of habeas corpus to be directed to William Skinner, the father of the applicant, and one Anne Deverall, to bring up the body of Skinner, the infant, who was six years of age, in order that it might be placed under the care of its mother. He founded his motion on affidavits of the mother, and others, who stated, that, after the marriage, Skinner had treated his wife with the greatest cruelty and brutality, and that a separation took place in consequence, and that he had since lived and cohabited with Deverall; that the wife had taken care of the child, but that the husband had some time since caused a writ of habeas corpus to be issued out of the Court of King's Bench, and that on the parties attending before Mr., now Lord Chief Justice Best, at chambers, it was agreed, that the child should be placed under the care of a third person; that the father had since taken it away by stratagem and fraud, and that he was now confined in Horsemonger-lane Gaol, where he still cohabited with Deverall, and that she took the child to him every day.

The Court doubting their jurisdiction, and observing that the better course to be adopted was, to make an application to a Master in Chan-

cery, who might cause a proper guardian to be appointed, and apply funds necessary for the maintenance and education of the child, granted a rule to shew cause why the writ of habeas corpus should not issue and be served on the father as well as the gaoler of Horsemonger-lane prison, requiring him to bring up the bodies of Skinner and his child. And on this day, no cause being shewn, the father and child attended in Court, the former being in the custody of the gaoler, when Mr. Serjeant Lawes renewed his application to have the child given up to its mother. [The argument of the learned Serjeant is omitted.]

Lord Chief Justice BEST. When this case first came before me at chambers, I felt considerable difficulty, and thought that, under the circumstances, neither the father nor mother was entitled to have the custody of the child; and it was there agreed on by both the parents, that it should be placed under the care and protection of a third person. Still the father had a power to take it away, and although the Court might direct the child to be brought up by a writ of habeas corpus, yet the difficulty is, what is to be done with it now it is before us. I was referred to Blisset's Case [Lofft, 748], and it certainly is extremely strong to shew, that the power of assigning the custody of a child brought before the Court of King's Bench, was discretionary, if the father appeared to be an improper person to take it; and I therefore thought that the most prudent course would be to assign it over to the care of a third person, and which was acceded to by both its parents. But it now appears that the father has removed the child, and has the custody of it himself; and no authority has been cited, to shew that this Court has jurisdiction to take it out of such custody for the purpose of delivering it over to the mother. In cases of similar applications to the Court of King's Bench, they generally refer the parties to a Master in Chancery, who may ascertain whether there be sufficient property to provide for the support of the child, or whether it might be made a ward of that Court, or he might appoint a guardian to take care of it; and that therefore appears to me to be the wisest and proper course; at all events, our authority can only be coequal with that of the Court of King's Bench. But the Court of Chancery has a jurisdiction as representing the King as Parens Patriæ, and that Court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receive proper instruction and education; and if a sum equivalent to its maintenance can be obtained, the Lord Chancellor will order it to be done, without enquiring where the funds are to come from. In the case of The King v. De Manneville, the Court of King's Bench held (5 East, 221) that the father, although an alien enemy, of a child, however young, born in wedlock, was entitled to the custody of it, unless it appeared probable that he intended to remove it from the kingdom, or to abuse his trust; and on the child's being brought before them by a writ of

habeas corpus, they ordered it to be remanded to the custody of the father; and on a petition being afterwards presented to the Lord Chancellor, on behalf of the mother and child, his Lordship made an order restraining the father from removing the child, or doing any act for the purpose of removing it out of the jurisdiction of that Court, and he would not allow the mother to have the possession of it, as she had withdrawn herself from the protection of her husband. On these grounds, I am of opinion that we have no authority to interfere in this case, and more particularly so, as there is no charge of ill-treatment by the father.

Mr. Justice PARK. In the case of De Manneville v. De Manneville, the Lord Chancellor said, that (10 Ves. 59) the Court of King's Bench has not within it, by its constitution, any of that species of delegated authority that exists in the King as Parens Patriæ, and resides in the Court of Chancery, as representing his Majesty; and his Lordship further observed (Id. 61) that he had removed a child from its father, who was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant; and that he thought it not inconsistent with a due attention to parental authority, so abused, to call in the authority of the King as Parens Patriæ. That appears to me to be expressly applicable to the present case; and an application to that Court seems to be the proper course to be adopted. At all events, it shews that we have no power to interfere on a motion of this description.[1]

1 Accord: Rex v. Greenhill, 6 Nev. & M. 244 (1836). With reference to the jurisdiction of the Chancellor, see Wellesley v. Duke of Beaufort, 2 Russ. 21 (1827), where Eldon, L. C., said: "But if any one will turn his mind attentively to the subject, he must see that this court has not the means of acting except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise the jurisdiction usefully and practically, only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant." See, also, Reg. v. Gyngall, [1893] L. R. 2 Q. B. 232, 62 L. J. N. S. (Com. Law) 559.

Compare the language of Cottenham, L. C., in In re Spence, 2 Phil. 247 (1847): "I have no doubt about the jurisdiction. The cases in which this court interferes on behalf of infants are not confined to cases in which there is property. Courts of law interfere by *habeas* for the protection of the person of *any* body who is suggested to be improperly detained. This court interferes for the protection of infants, *qua* infants by virtue of the prerogative which belongs to the crown as parens patriæ, and the exercise of which is delegated to the great seal."

By statute (Talfourd's Act, 2 and 3 Vict. c. 54), it was provided that the Lord Chancellor and Master of the Rolls might lawfully give to a mother custody of children under the age of seven, as against the father or any one to whom the father had given them in custody, and might make orders for the access of the mother to infants of any age. By the Guardianship of Infants Act, 49 and 50 Vict. c. 27, § 5 (1886), this rule was extended to apply to infants of any age.

FINLAY v. FINLAY.

Court of Appeals of New York, 1925. 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by A. Lugar Finlay against Dorothea Blodgett Finlay. From an order of Appellate Division (212 App. Div. 786, 208 N. Y. S. 585), reversing order of Special Term which granted defendant's motion for judgment on pleadings, defendant appealed by permission, and the Appellate Division certified a question to the Court of Appeals. Question answered, order of Appellate Division reversed, and that of Special Term affirmed.

The Appellate Division certified the following question:

"Does the complaint state a cause of action of which the Supreme Court has jurisdiction?"

CARDOZO, J. The case is here upon defendant's motion for judgment on the pleadings.

Plaintiff, a resident of St. Louis, Mo., brings this action against his wife, who is living in New York, for judgment regulating the custody of their infant children. Husband and wife formerly had their home together in Westchester county, New York. In the early part of 1923 the wife left the husband, taking the children with her, and since then has refused to live with him. Following this abandonment, the husband went to St. Louis, where he still maintains his home. The children are with their mother in Westchester county, N. Y. She refuses to give them up. The husband does not wish a separation. He could not get one from the courts of New York in view of his nonresidence. Civ. Prac. Act, § 1162. What he wishes is a judgment that will enable him to share with his wife the custody of the children. He prays for a decree "granting unto the plaintiff the custody and control during fixed periods each succeeding year of his said two sons, and for such other and further relief as may be just in the premises."

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. Woodworth v. Spring, 4 Allen (Mass.) 321, 323; White v. White, 77 N. H. 26, 86 A. 353; Hanrahan v. Sears, 72 N. H. 71, 72, 54 A. 702; Matter of Hubbard, 82 N. Y. 90, 93. For this, the residence of the child suffices, though the domicile be elsewhere. Matter of Hubbard, supra. But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependent upon status. Cf. Kline v. Kline, 57 Iowa, 386, 10 N. W. 825, 42 Am. Rep. 47; Griffin v. Griffin, 95 Or. 78, 187 P. 598; Lanning v. Gregory, 100 Tex. 310, 99 S. W.

542, 10 L. R. A. (N. S.) 690, 123 Am. St. Rep. 809; Blackinton v. Blackinton, 141 Mass. 432, 436, 5 N. E. 830, 55 Am. Rep. 484; Matter of Standish, 197 App. Div. 176, 188 N. Y. S. 900. Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child.

We think the welfare of children does not appear from the complaint to be the basis of the husband's prayer for an apportionment of parental rights, nor is an action between contending spouses the proper form of remedy.

One situation there is, indeed, in which such an inquiry will be pursued in connection with an action between the spouses, or as a supplement thereto. The statute permits a judgment fixing the custody of children as an incident to a judgment for divorce or separation. If divorce or separation is refused, jurisdiction is not retained to adjudicate the incident upon the failure of the principal. Davis v. Davis, 75 N. Y. 221. Relief must then be sought, not in the statutory action for divorce or separation, but by recourse to other remedies. "In this statutory action, the power of the court is to be sought in the statute itself, and only such judgment can be rendered as is authorized thereby." Davis v. Davis, supra, page 227; Mollring v. Mollring, 184 Iowa, 464, 167 N. W. 524; cf. Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408, Ann. Cas. 1914B, 407. Some courts, construing their own statutes, have reached a different conclusion where divorce or separation has been demanded, but refused. Morrill v. Morrill, 83 Conn. 479, 77 A. 1; Horton v. Horton, 75 Ark. 22, 86 S. W. 824, 5 Ann. Cas. 91; Power v. Power, 65 N. J. Eq. 93, 55 A. 111. They apply in such circumstances the principle that equity, obtaining jurisdiction for one purpose, will grant complete relief. Nowhere is it held that an action may be maintained for custody simpliciter.

The plaintiff now before us makes no demand for divorce or separation. That being so, we seek the measure of his rights, not in the statutory jurisdiction in causes matrimonial, but in the jurisdiction to determine the custody of infants as it exists at law and in equity irrespective of the statute. We find no authority for the exercise of that jurisdiction through the medium of an action by one parent against the other. Except when adjudged as an incident to a suit for divorce or separation, the custody of children is to be regulated as it has always been in one or other of two ways: By writ of habeas corpus, or by petition to the chancellor. Queen v. Gyngall, 1893, 2 Q. B. Div. 232, 238; Eversley on the Law of Domestic Relations, 514 et seq.; cf. People ex rel. Riesner v. New York Nursery & Child's Hospital, 230 N. Y. 119, 124, 129 N. E. 341. The plaintiff argues that habeas corpus is denied to him by section 70 of the Domestic Relations Law (Consol. Laws, c. 14), since he is not an inhabitant of the state. * * * If we were to assume with the plaintiff that the writ has been denied to him, there would remain his remedy by petition to the chancellor or to the court that has succeeded to the chancellor's prerogative. Queen v. Gyngall, supra;

Matter of Spence, 2 Phil. Ch. 247, 248; Wilcox v. Wilcox, 14 N. Y. 575; Matter of Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699; Power v. Power, supra. Nothing in the habeas corpus act affects that jurisdiction, inherent in courts of equity, or changes or diminishes the remedy available. It is not a remedy by suit. It is a remedy by petition. The distinction is implicit and fundamental alike in the genesis of the jurisdiction and in its subsequent development.

We find no sufficient reason for discarding this historic remedy and establishing in its place, or even as a supplement, a remedy of action. The difference is more than formal. The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriæ to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate, and careful parent" (Queen v. Gyngall, supra), and make provision for the child accordingly. He may act at the intervention or on the motion of a kinsman, if so the petition comes before him, but equally he may act at the instance of any one else. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another. Queen v. Gyngall, supra. He "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriæ." Matter of Spence, supra. The plaintiff makes no pretense of invoking this paternal jurisdiction. We are not advised by his complaint whether a division of the custody will tend to the benefit of his sons or to their detriment. He invokes the jurisdiction of a court to settle a dispute. Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

The remedy by action is thus seen to be incongruous in principle. It is more than that, however; it is cumbrous, expensive, and dilatory in practice. There must be pleadings and notices of trial and crowded calendars and formal proofs. The remedy by petition is summary and cheap and swift. It comes to us established and consecrated by tradition and practice immemorial. We are unwilling to displace it by a less efficient innovation.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in the Appellate Division and in this court, and the question certified answered in the negative, without prejudice to any other remedy consistent with this opinion that is available to the respondent.

HISCOCK, C. J., and POUND, MCLAUGHLIN, CRANE, ANDREWS, and LEHMAN, JJ., concur.

Order reversed, etc.[2]

[2] For a collection of the American cases in which Equity has regulated the custody of children, see Ex parte Badger, 286 Mo. 139, 226 S. W. 936, 14 A. L. R. 286 (1920); also Lippincott v. Lippincott, 97 N. J. Eq. 517, 128 A. 254 (1925).

PEOPLE ex rel. SINCLAIR v. SINCLAIR.

Supreme Court, Appellate Division, First Department, 1904. 91 App. Div. 322, 86 N. Y. Supp. 539.

Appeal by the defendant, Daniel A. Sinclair, from an order of the Supreme Court, made at the New York Special Term, and entered in the office of the clerk of the county of New York on the 2d day of November, 1903, in a habeas corpus proceeding, awarding to relator the custody of the infant child of the parties to this proceeding.

HATCH, J. The parties to this proceeding were married on or about the 2d day of June, 1896, and lived together as husband and wife until the 2d day of July, 1903. The child, the custody of which is the subject of this controversy, is a boy born March 30, 1900; consequently he will be four years of age in the month of March next ensuing. It is undisputed that the wife is possessed of considerable property and has an independent income of $3,000 a year. About four years ago, by an arrangement between the husband and the wife, she purchased the house No. 809 Lexington avenue in the borough of Manhattan, and paid for and furnished the same exclusively with her own money. In the house the wife caused to be fitted up an office for her husband, who is a practicing physician. The parties resided at this place continuously, living together as husband and wife, until July 2, 1903, at which time the husband left the premises in Lexington avenue, taking the child with him, and went to No. 226 East Sixty-Second street, where his mother and sister resided, and he has continuously resided there since. Upon taking up his residence at this place he requested his wife to come and live with him at that place, which she declined to do. Subsequently she went to the place of residence of the husband, possessed herself of the child and took it with her to a summer residence at Pine Hill, Ulster county, N. Y., where she was spending the summer. On the 7th of August, 1903, the husband again took the child from the possession of the wife and returned with him to his residence in the city of New York. Thereafter and on the 14th day of August of the same year plaintiff sued out this writ, requiring the husband to produce the child before the court. The proof submitted upon the part of the wife tended to establish that she had at all times, while living in Lexington avenue, paid all of the household expenses of the family without aid or assistance from her husband; that she had had almost the sole care and nurture of the child, and had discharged her duties as mother of it with fidelity and for its best interests. It is evident from the proof submitted that the relator is abundantly able to care for and support the child, attend to its proper nurture and training, and nothing appears to cast any discredit upon her fitness or disposition to discharge fully and completely the duties of a mother towards the child, or but that at the residence in Lexington avenue the child will be in all respects well provided for in every matter re-

lating to its future welfare. The husband has received an income from his profession during these years of about $2,500 a year and during the last year it amounted to $2,900. He claims to have given to his wife from $75 to $100 every month, has paid his own personal expenses and bought some clothing for the child. In the main, however, it is quite probable that in the Lexington avenue residence the wife bore the larger share of the burden of supporting the household. The house occupied by the husband on Sixty-Second street is a boarding house, wherein his mother and sister and himself have comfortable quarters, and nothing appears to show that it is not a suitable place of residence for the husband and his family.

The difficulties which have arisen between these parties, it is quite clear, are not due so much to any lack of affection and regard for each other, as it is in the relations which they bear to other persons connected with the respective families, and the more or less officious interference by others, who should have sense sufficient to know that their intermeddling may result in the entire breaking up of a home. The wife has as a member of her household an elderly aunt, who has stood in the relation of a parent to her since early infancy, her own parents having died, and between the aunt and the relator there is a loving affection and regard which such relation has produced. In the household of the husband lives his mother and sister, to whom he is devotedly attached, and upon whom he bestows the affectionate love and regard of a son and brother, and it is quite likely, as is proper for him to do, he devotes some part of his income for their support and maintenance. Between the wife and her aunt on one side and the mother and sister upon the other, there is an estrangement and an antipathy. It is evident that the relatives of the husband are obnoxious to the wife and her aunt, and that the wife's aunt is obnoxious to the husband, his mother and sister. In this condition certain cousins of the wife have interfered, only to breed still further trouble between the husband and wife. Under such circumstances it is quite evident that the wife cannot live in comfort with her husband in the same house with his mother and sister, while the husband has undoubtedly been subjected to many discomforts at the hands of the wife's cousins and perhaps of the aunt in the house of the wife. Therefore it is that these differences have grown up, and we can well understand the perplexing difficulty which the learned judge below found in making disposition of the custody of this infant. There can be no doubt but that under section 40 of the Domestic Relations Law (Laws 1896, c. 272) the court has the authority to award the custody of the child to the mother or to the father. People ex rel. Sternberger v. Sternberger, 12 App. Div. 398, 42 N. Y. Supp. 423. It is the undoubted rule that the husband is regarded in the law as the head of the household and the law awards to him the care and the custody of the children, and charges upon him the duty of their proper care and maintenance as well as the support of his wife. And unless some reason appears the

court is not justified in interfering with the law in this regard, but is bound to confirm such right in the husband in the event that the welfare of the child will not be prejudiced thereby. In all cases, however, where the custody of tender infants is involved the prime consideration is the welfare of the child. The right of the husband must always yield to such considerations. Nature has devolved upon the mother the nurture and care of infants during their tender years, and in that period such care, for all practical purposes, in the absence of exceptional circumstances, is almost exclusively committed to her. At such periods of life courts do not hesitate to award the care and custody of young infants to the wife as against the paramount right of the husband where the wife has shown herself to be a proper person and is able to fully discharge her duty toward the child. We do not find it necessary to rehearse in detail all that the record shows respecting the unhappy differences which have arisen between these parties nor to determine with whom lies the greater fault in producing their separation. We have little doubt in concluding that all of their differences might be adjusted if such adjustment involved a consideration of themselves alone. For the present they are living in a state of separation and the custody of the child should be awarded where it will be best cared for. In view of its tender years, that the mother is a proper person and has the disposition to look after its welfare in every respect and is abundantly able pecuniarily to discharge such duty in the fullest extent, we have concluded that the court below was correct in reaching the conclusion that for the present the custody of the child should be awarded to the mother. The order provides that the father of the infant child shall have free access to visit and see it at any and all times, and that he shall be notified of any change made in the abode of the infant. The right of visitation by the father is thus freely and fully preserved and gives to him opportunity to see that the welfare of the child is protected; and that it does not become estranged from him in affection and he can exercise upon it his fatherly care. Changed conditions and the lapse of time will vest in him the right to apply to the court to interpose in his behalf in asserting his rights.

These views lead us to the conclusion that the order should be affirmed, but without costs to either party.

INGRAHAM and MCLAUGHLIN, JJ., concurred. VAN BRUNT, P. J., dissents.

LAUGHLIN, J. (dissenting). The facts are sufficiently stated in the prevailing opinion. The authority conferred upon the courts by section 40 of the Domestic Relations Law (Gen. Laws, c. 48; Laws 1896, c. 272) with reference to the custody of minor children where the parents are living apart, even without a judicial decree or a separation agreement, must be construed and applied with due regard to the natural and constitutional rights of the parties. The husband has done nothing to forfeit his right to say where his family shall reside, and

the relator has no good and sufficient reason to justify her refusal to live with her husband and son. Nor is it claimed or shown that the father is not kind and affectionate toward his child, or is not able to properly clothe and support him, or is not a fit person to control his bringing up. The husband, in refusing to live in his wife's house, and in selecting another abode, but exercised his legal rights. The relator was welcome to the new home, and was treated by respondent with due consideration, but she would not come or remain. Ordinarily, of course, a child of such tender age should not be deprived of the mother's affectionate care and attention, but the place for the mother is with her husband and child. When she persists in living apart from her husband, merely because she does not like or cannot get on peaceably with his relatives, and prefers to live, by the expenditure of her own fortune, in greater luxury than the husband is able to provide, the court should not, by awarding the custody of the child to her, approve her course and conduct, and thus perhaps unwittingly bring about the permanent separation of the husband and wife. Nothing has occurred between these parties to render it impossible, or even very difficult for them to reside together, and it is reasonable to presume that the mother has sufficient regard and affection for her child, if not for her husband, to return to the child and husband if the court holds that, under existing circumstances, this is her duty, and that she may not upon those facts remove the child from the home the husband has provided for his family.

Order affirmed, without costs.

PEOPLE ex rel. SINCLAIR v. SINCLAIR.

Supreme Court, Special Term, New York County, 1905. 47 Misc. Rep. 230, 95 N. Y. Supp. 861.

Motion to vacate order in habeas corpus proceedings, awarding the custody of a child to the relator.

BISCHOFF, J. The facts of this case are quite fully discussed in the opinion rendered by the Appellate Division when affirming the order made herein, awarding the custody of the child to the relator, its mother. People ex rel. Sinclair v. Sinclair, 91 App. Div. 322, 86 N. Y. Supp. 539.

At the time when the order thus affirmed by the Appellate Division, was made, the child, a boy, was three years of age. He is now five years of age, and the respondent moves for an order giving him the custody. So far as the rights and merits of the controversy, which has resulted in the unfortunate estrangement of this husband and wife,

are concerned, the situation is the same in all its essential details as it was when the order was originally made giving the custody of the child to the wife, but the sole ground upon which this order was affirmed was that, in view of the tender age of the child, its welfare required that it should receive its mother's care, and that, so far, the paramount right of the father should give way. As was said by the Appellate Division in this case, with reference to the provisions of Domestic Relations Law, Laws 1896, p. 222, c. 272, § 40, whereby the rights and duties of husband and wife with regard to the children are assimilated: "It is the undoubted rule that the husband is regarded in the law as the head of the household and the law awards to him the care and the custody of the children, and charges upon him the duty of their proper care and maintenance as well as the support of his wife. And unless some reason appears the court is not justified in interfering with the law in this regard, but is bound to confirm such right in the husband in the event that the welfare of the child will not be prejudiced thereby."

While affidavits have been submitted, to some length, by both parties upon the present application, there is no substantial ground for a conclusion that this husband and wife are not equally fit custodians of this child, so far as the matter depends upon their personal qualities, their moral standing and their ability, financially, to accord to the child all that its welfare would require. The separation has been due to the fact that these parties have been unable to agree in their domestic relations. Whether they will be able to come to better accord in the future is a matter which it is not within the power of the court to forecast, but, treating the matter as it is presented, in view of the existing separation, the age of the child and the relative fitness of the parents as its custodians, I must hold that the father, by reason of his paramount right in law, is entitled to the custody of the child at this time. A boy of three years of age may properly be deemed to be of such tender age that considerations of his welfare call for his having a mother's care, but the same cannot be said when the child has reached the age of five. The Domestic Relations Law not having effected any substantial change in the husband's paramount right, founded upon his primary duty to support the family, the case of People ex rel. Barry v. Mercein, 3 Hill, 399, 38 Am. Dec. 644, is an authority directly in point. In that case the court held that the father was entitled to the custody of his child, when the child had reached the age of five years, the custody having theretofore been awarded to the mother by reason of the tender age of the child. Other things being equal, I find no escape from the conclusion that the respondent's claim to the possession of this child at its present age must control. If the question of the child's tender years, as bearing upon the necessity of his having a mother's personal care, is not eliminated at the age of five years, it is difficult to see how it would be eliminated at the age of ten years, and I conclude, therefore, that the "changed conditions and lapse of time," referred to by the Appellate Division as affording the respondent the

right to interpose for the assertion of his claim to the possession of the child, are sufficiently present to justify the granting of the relief sought.

Motion granted.[3]

CHAPSKY v. WOOD et al.

Supreme Court of Kansas, 1881. 26 Kan. 650, 40 Am. Rep. 321.

Petition for a writ of habeas corpus filed in this court by Morris A. Chapsky against Joseph H. Wood and wife. * * *

The opinion of the court was delivered by

BREWER, J. In this case of the petition of Morris A. Chapsky for the possession of his minor child, counsel have in their arguments expressed very feelingly and truthfully the embarrassments and difficulties which surround the decision of a case like this. These arise, not because there is a conflicting question of fact to be settled by the court, for that is a matter of everyday occurrence in judicial proceedings; it is not that it is a question between a grown man on one side and a grown woman on the other, for we could dispose of every question affecting simply them, without any embarrassment or hesitation. The burden of the case is, that the decision is one which involves the future welfare of a little girl; and I think no man can look upon the face of a bright and happy little girl, like the one before us, and come to a decision of a question which may make or mar her future life, without hesitation and feeling; certainly we are not so insensible as to be able to do it.

The questions of law which are involved in a case like this are few in number, and, I think, not subject to much doubt. They may be

[3] Affirmed in the Supreme Court, Appellate Division, 105 App. Div. 642, 94 N. Y. S. 1159 (1905).

Even in the absence of statutes, American courts, in determining the custody of children upon habeas corpus, have not conceded to the father an absolute right to the custody of his children as against the mother. Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824 (1923); Mercein v. People, 25 Wend. (N. Y.) 64, at page 93, 35 Am. Dec. 653 (1840).

Under the Statute of 12 Chas. II, c. 24 (1661), in England, a father could appoint a testamentary guardian of the person of his child, whose right to the custody of the child was superior to that of the mother. This was changed by the Statute of 49 and 50 Vict. c. 27, § 2, which gives to either surviving parent the custody of infant children, and allows only a surviving parent to appoint a testamentary guardian of the person. For a similar statute in Pennsylvania, see Act May 13, 1925, P. L. p. 689 (Pa. St. Supp. 1928, §§ 8314–8316).

The right of the testamentary guardian is, like the right of the parent, subject to the control of the Chancellor. Lippincott v. Lippincott, 97 N. J. Eq. 517, 128 A. 254 (1925).

On the question of controversies between parents as to the religious education of their children, see note in 12 A. L. R. 1153. See, also, Ward v. Laverty, [1925] A. C. 101, 131 L. T. 614; In the Matter of the Guardianship of Jacquet, 40 Misc. Rep. 575, 82 N. Y. S. 986 (1903).

summed up briefly thus: The father is the natural guardian, and is prima facie entitled to the custody of his minor child. This right springs from two sources: One is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself, and because of this obligation to take care of and support this helpless being arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation.

The second proposition of law is, that a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property. If today Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and the property never can be reclaimed; but he cannot, by simply giving away his child, relieve himself from the obligation to support that child, nor deprive himself of the right to its custody.

I might say here that the statute has provided for a relinquishment through probate court proceedings, which may be considered (but that is outside this case) irrevocable.

The third proposition is, that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case and relieve us from all future difficulties. A mere right of property may be asserted by any man, no matter how bad, immoral, or unworthy he may be; but no case can be found in which the courts have given to the father who was a drunkard and a man of gross immoralities the custody of a minor child, especially when that child is a girl. The fact that in such cases the courts have always refused the father the custody of his child, shows that he has not an absolute and uncontrollable right thereto.

The fourth proposition is that, though the gift of the child be revocable, yet, when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then whether the courts will enforce the father's right to the custody of the child will depend mainly upon the question whether such custody will promote the welfare and interest of such child. This distinction must be recognized. If, immediately after the gift, reclamation is sought, and the father is not what may be called an unfit person by reason of immorality, etc., the courts will pay little attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. In other words, they will consider that the law of nature, which declares the strength of a father's love, is more to be considered

than any mere speculation whatever as to the advantages which possible wealth and social position might otherwise bestow. But, on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel.

The fifth proposition is, that in questions of this kind three interests should be considered: The right of the father must be considered. The right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right; and yet they who have for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy when the burden is especially heavy, when the labor and care are of a kind whose value cannot be expressed in money—when all these labors have been performed and the child has bloomed into a bright and happy girlhood, it is but fair and proper that their previous faithfulness, and the interest and affection which these labors have created in them should be respected. Above all things, the paramount consideration is, What will promote the welfare of the child? These, I think, are about all the rules of law applicable to a case of this kind.

Now, passing to the facts, which I shall only outline: Morris A. Chapsky married the mother of this child ten years ago. The marriage was not acceptable to his parents, though for no reason that we are advised of, involving the character of any of the parties. Returning home immediately after his marriage, the father, commenting upon the fact of the marriage, which had been made without his consent, was not satisfied, and bade him start out for himself. Some criticism has been placed upon this conduct, which, we think, is not deserved. It is often best for a young man that he should be turned out upon his own resources and compelled to struggle for himself; and that his father was not destitute of affection for his child is patent from the fact that he made him a gift of money largely in excess of that which most young men have to start with. Whether his judgment was good or otherwise cuts no figure in this case. He started out with this money, and wandered around, as a young man is apt to do, and, drifting from place to place, finally came penniless to Kansas City. He struggled for a series of years under pecuniary embarrassment; and during these years this child was born. His wife's health was delicate, and she was obviously unable to discharge ordinary household duties, even without the care of this child; and the respondent, Mrs. Wood, her sister, kindly provided for her during her confinement, and took care of the child.

The child was left with her (Mrs. Wood), and from that day to this, a period of about five and one-half years, has been all the time in her custody. During the very early infancy of the child, the question arose as to her custody—Mrs. Wood insisting that the mother should take the child, or that it should be given to her. It is clear that this matter of discussion between the parties lasted for some time, and we are satisfied from the testimony that in fact a gift was made of the child by both mother and father to Mrs. Wood. The mother's letters exhibit this; and, while the father does not recollect of having made such gift, we are convinced that he did so, and by parol agreement relinquished to the respondents his parental rights. No writing passed between them; but, regarding as we do that a gift is not decisive in the case, unless made in accordance with the statutory form, the want of a writing cuts no figure now. The child was given to Mrs. Wood, and has been in her care for five years and a half—from the date of its birth to the present day. What the future of the child will be is a question of probability. No one is wise enough to forecast, or determine absolutely, what or what would not be best for it; yet we have to act upon these probabilities from the testimony before us, guided by the ordinary laws of human experience. Involved in the question as to what will promote the welfare of the child, are questions of wealth, questions of social position, questions of health, questions of educational advantages, moral training —of all things, in short, which will tend to develop a little girl into a perfect woman.

And, first, we remark that the child has had, and enjoys to-day, good advantages, and its welfare has been promoted, and is promoted to-day. No one has said that this child has lacked anything which a child should have, and the testimony all shows that it has been cared for most patiently and faithfully—as well as it could have been cared for by any one; and to that care the face and appearance of the child abundantly testify. This fact does not rest on probabilities. It is a serious question, always to be considered, whether a change should be advised. "Let well enough alone," is an axiom founded on abundant experience. There is nothing in the present situation of the respondents, their pecuniary condition, the business capacity of the husband, their social position, their affection for this child—absolutely nothing which tends in any way to suggest that the welfare of the child, which has been promoted in the past, would be limited or abridged in the future. What they have done for the child tends to show what they will do through the future years of its girlhood. What that has been is certainly as much, and I think more, than the average child receives.

Again, while there is more wealth on the side of the father, and pecuniary advantages are held out for her future—greater than those, perhaps, which the respondents can present—yet we cannot be insensible to the surroundings under which the child would be placed if committed to its father. The grandfather has been on the stand before us, and not merely from the testimony adduced from his relatives and neighbors,

but from his appearance and manner on the stand, evidently he is a gentleman of character and responsibility, not destitute of affection, and one who has provided a comfortable home and is in a position to give to the child all these advantages. Yet the child, if it goes, goes to the care of its father; and while there is no testimony showing that the father is what might be called an unfit person, that his life has not been a moral one, yet we can but think that it is developed, both by testimony and his manner and appearance on the stand, that there is a coldness, a lack of energy, and a shiftlessness of disposition, which would not make his personal guardianship of the child the most likely to ripen and develop her character fully. He seems to us like a man still and cold, and a warm-hearted child would shrink and wither under care of such a nature, rather than ripen and develop. These are facts that we can but notice, and they have in them no imputation against the father of an unkind nature or immoral life; but the facts as they impress us are, that the child would not really grow to its fullest promise under the care of such a man.

Again, and lastly, the child has had, and has to-day, all that a mother's love and care can give. The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other one can really possess; but, so far as it is possible, springing from years of patient care of a little, helpless babe, from association and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in Mrs. Wood that can be found nowhere else. And it is apparent that, so far as a mother's love can be equaled, its foster mother has that love, and will continue to have it.

On the other hand, if she goes to the house of her father's family, the female inmates are an aunt, just ripening into womanhood, and a grandmother; they have never seen the child; they have no affection for it springing from years of companionship. While she is a child of perhaps a favorite son or brother, she is also the child of a disowned or repudiated daughter-in-law and sister-in-law, and the appeal which the child will make naturally—and the child is one to make a strong appeal to any one—will always be shadowed and clouded by the fact that she comes from one who was not a favorite in that family.

Human impulses are such that doubtless they would form an affection for the child—it is hardly possible to believe otherwise; but to that deep, strong, patient love which springs from either motherhood, or from a patient care during years of helpless babyhood, they will be strangers.

They cannot have this; and to my mind, I am frank to say, this last is the controlling consideration. And these three considerations are those which compel us to say that we cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child; and, if we should see a child of ours in the same circumstances, we cannot believe that we should deem it wise or

prudent to advise a change, notwithstanding the pecuniary advantages that might seem to be offered to it.

The judgment of the court therefore is, that the child will be remanded to the respondents; and the petition is dismissed, at the cost of the petitioner.

All the Justices concurring.[4]

ROWE v. RUGG.

Supreme Court of Iowa, 1902. 117 Iowa, 606, 91 N. W. 903, 94 Am. St. Rep. 318.

Appeal from Iowa District Court. Hon. M. J. Wade, Judge.

Action to recover damages for an assault and battery. Trial to a jury, and verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

SHERWIN, J. This is an action by a child of eight years of age to recover of the defendant, who is his aunt, damages for corporal punishment administered by her. That she moderately chastised the child was admitted by the defendant, and the jury found that it was not, in fact, excessive. It conclusively appeared that it was authorized by the plaintiff's mother, and the only questions before us are whether the mother has such authority over her own child during the life of her husband, and while he is the head of the family, that she may delegate her power in the premises to another, and whether one acting under such delegated authority may legally inflict moderate punishment upon a minor child.

[4] The authorities are not uniform upon the question of the effect of an agreement by a parent to give the custody of the child to another. In State v. Deaton (Tex. Civ. App.) 52 S. W. 591 (1899); Stringfellow v. Somerville, 95 Va. 701, 29 S. E. 685, 40 L. R. A. 623 (1898); and Odlasek v. Odlasek, 98 W. Va. 357, 127 S. E. 59 (1925), it was held that the burden of proof was on the parent to show that the child's interests would be bettered by restoration to the parent. In Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137, 7 Ann. Cas. 446 (1905), practically no effect was given to the agreement.

Even without an agreement, if the child has been allowed to remain in the custody of others for a considerable time, and the court thinks that its best interests will be served by remaining in such custody, the parent cannot recover it. Greene v. Walker, 227 Mich. 672, 199 N. W. 695 (1924). But the advantage of being brought up in the home of a parent will outweigh the advantage of greater wealth. State ex rel. Cline v. Cline (Fla.) 107 So. 446 (1926); Stapleton v. Poynter, 111 Ky. 264, 62 S. W. 730, 23 Ky. Law Rep. 76, 53 L. R. A. 784, 98 Am. St. Rep. 411 (1901).

In Re O'Neal, 3 Am. L. Rev. 578 (Mass. 1869), the court held that a father, who was separated from his child during its early years by misfortune rather than by his fault could not recover the child from persons who had taken it, supposing it to be an orphan, and were giving it a better home than the father could give it.

The mother of an illegitimate child has the primary right to its custody. See 51 A. L. R. 1507, for a collection of the cases.

We first inquire whether either parent may legally authorize a third person to administer such chastisement to their child as they might themselves lawfully inflict. It is the general rule that those having the care, custody, and control of minor children may, for the purpose of proper discipline and control, administer such moderate and reasonable chastisement as shall effect the desired object, and this rule has been applied generally to all those occupying a position in loco parentis. The law continually looks to the future of the child, as well as to its present condition; and it is its policy, in dealing with the various questions which are constantly arising affecting its care and custody, to determine the line of action that shall best subserve its present and future welfare. The duties which the parent owes to the child as well as to the public, in the matter of its maintenance, protection, and education, have generally been held to give the parent or other person occupying such relation the power to thus discipline and correct it. While we are not prepared to hold that a parent may, without restraint, lawfully authorize any and all persons to administer physical punishment to his or her child, we see no reason why such authority may not be given under certain circumstances. For instance, if a child is placed in the temporary care of some person, in whom the parent has great confidence, on account of relationship or otherwise, why may not authority to properly correct the child be delegated for the time being? Or suppose a parent is physically unable to administer needed punishment; why may he not legally direct a friend to do so for him? The child and society are as fully protected in such case as in one where the punishment was administered by the parent, because, if immoderate and unreasonable, the same consequences would follow in both cases. And on the other hand, the failure to correct might be detrimental to the child. As bearing upon this question, see Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810.

The mother, under section 3192 of the Code, is "equally entitled to" the "care and custody" of the children. This must necessarily mean that she is also equally entitled to control and discipline them. Being given this power, it must follow that, if the father may authorize another to punish his child, the mother may do so.

The instructions of the trial court were in harmony with these views, and the judgment is affirmed.[5]

[5] The question of whether a parent is liable for the excessive punishment of a child is considered in Chapter 5, p. 116, infra.

MAD.D.R.

CINCINNATI HOUSE OF REFUGE v. RYAN.

Supreme Court of Ohio, 1881. 37 Ohio St. 197.

This was a proceeding in the court below, by defendant in error, to obtain the custody of his three minor children. In his petition for a writ of habeas corpus he avers that he is the father of these children, all of whom are under the age of six years; that their mother is dead, and that he has always provided for them in a suitable manner and is still willing so to do; that they were forcibly taken from his home, on the 16th of November, 1880, and carried to the Children's Home, and from thence, upon the commitment of Henry Harmyer, a justice of the peace of Hamilton county, committed to the house of refuge; that he had no notice of the taking of these children, or of these proceedings. He therefore claims that the custody of said children by plaintiff in error is without legal authority. The answer of the directors of the house of refuge justifies the custody and detention under the warrant of commitment of said justice of the peace.

It appears that these children were found by one Joseph L. Smith, an officer of the society for the prevention of cruelty to children, and brought before the justice for hearing upon his affidavit that they were without a home and homeless.

On the hearing, which took place the same day, and without notice to the father, the justice found from the testimony of said officer, that they were infants under the age of sixteen, without a home and homeless, and were suitable persons to be committed to the discipline and instruction of the Cincinnati house of refuge. He thereupon committed them to said house of refuge, until discharged by due course of law, or until they attain their respective majorities.

On the hearing upon habeas corpus, evidence was adduced pro and con, touching the fitness of the father to have the custody of these children, and as to the truth of the warrant of commitment.

In rendering its decision, the court held, that the proceedings before the justice, being without notice to the father, were void, and for that reason alone the children were discharged from the house of refuge, and restored to the father. It is conceded by the court and by counsel for defendant in error that it did not appear that the father was a proper person to have the guardianship and control of these children. It is further conceded that the proceedings and commitment by the justice were in all respects regular and valid, unless want of notice to the father invalidates them. It is for want of such notice alone that the children were discharged.

JOHNSON, J. Section 2087 of the Revised Statutes, as amended 77 O. L. 217, par. 3, is the law under which these children were committed to the house of refuge. That paragraph authorizes a mayor, police judge, or justice to commit minors under sixteen years of age,

upon complaint and due proof that they are homeless, or are without proper and suitable homes.

Section 2061 provides that "No commitment of an infant to a house of refuge and correction shall be for a shorter period than till such infant shall be reformed, or attain the age of majority, except in case of infants committed to await their trial, or as witnesses, and except in such cases as the board may, by its general rule, provide; but any infant, by whomsoever or for whatever cause committed, may at any time be discharged upon the order of the board duly entered upon its minutes, or upon habeas corpus, if the court or judge, upon hearing, decide that neither the interest of the minor nor of the public will be endangered by such discharge."

This section was amended, 78 O. L. 253, but since final judgment was rendered in this case; hence the amendment need not be considered, as it does not affect the question at bar.

Houses of refuge and correction, established since May 7, 1869, are governed by sections 2031 to 2082 of the Revised Statutes, while those established prior to May 7, 1869, are governed by sections 2083 to 2090, as amended.

Section 2050, which is applicable to both classes of houses of refuge, provides that the board may, in its discretion, receive into such institution infants under sixteen years of age, committed to their custody by the mayor, judge or justice of the peace, on complaint and due proof in the following cases:

1st. By parent, guardian, or next friend, of such infant, when, it appears, that by reason of incorrigible conduct, such infant is beyond control, and that from regard to the welfare of such infant and the protection of society, he should be placed under the guardianship of the board of directors of such house of refuge.

2d. When upon complaint by any one, and due proof that such infant is a proper subject for such guardianship, in consequence of vagrancy or of incorrigible or vicious conduct, and from the moral depravity of the parent, guardian, or next friend, they are incapable or unwilling to exercise proper care and discipline over such infant.

3d. When such infant is without a suitable home, and means of obtaining an honest living, or is in danger of growing up to an idle and vicious life.

Sections 2051, 2052, and 2053 provide for commitment of such infants, committed of crimes and offenses.

Section 2054 authorizes grand juries, in their discretion, where the evidence against an infant under sixteen years of age would warrant an indictment, to return to the court that the accused is a suitable person to be committed to the guardianship and correction of the directors of the house of refuge. Thereupon, on notice to the minor and giving him an opportunity to be heard, the court shall, without a jury, dispose of the case, and, if satisfied of the truth of the return, commit the accused.

The last clause of section 2061 clearly recognizes this principle: "But any infant, by whomsoever or for whatever case committed, may at any time be discharged upon the order of the board, duly entered upon its minutes, or upon habeas corpus of the court or judge, upon hearing, decide that neither the interest of the minor nor of the public will be endangered by such discharge."

No provision is made in the statute for notice to the parent, guardian, or next friend.

It was not the intention to confer upon mayors and like officers judicial powers over the legal rights of parents to the custody of their children. The paramount object is the good of such infants as are destitute of parental care. It is the exercise of that parental guardianship which the state has assumed. The proceeding is, in its nature, special. While notice to parents, or others standing in that relation to infants, should be given where practicable, it is not essential to the jurisdiction of the examining officer. These officers are not invested with power to finally adjudicate the legal rights of parties. The scope and purpose of this statute is to provide, in a summary manner, for the destitute and homeless, as well as the vicious, and to provide for the maintenance and discipline of those who might otherwise grow up in habits of idleness and crime. It is conceded that such a notice is not required when the infant is accused or convicted of crime, or is held as a witness. This is so, not because the parent has forfeited any of his legal rights, but because, in such cases, the police power of the state is paramount. So, where the grand jury, in place of an indictment for crime, makes a return that the infant should be committed to the house of refuge, or the reform farm, the court, after notice to the infant alone, and without a jury, determines the case, and commits the accused.

If this is a correct exposition of the statute, the next inquiry is, whether an act which does not require notice, is against public policy, and in violation of the fundamental law of the land? The error of the court below consisted in assuming that the judgment of the committing officer divested the parent of his legal right, without an opportunity of being heard. It is obvious that this is a misconception. The proceeding is purely statutory. It is intended to provide a summary method for caring for destitute children.

The commitment is not designed as a punishment for crime, but to place destitute, neglected, and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison. While no provision is made for a notice to those interested, if such there be, of the pendency of the proceeding, yet it would doubtless be proper for the examining officer, where it is practicable, before making the order, to require such notice, but the statute does not seem to require it as essential to the exercise of this power. As was said in Prescott v. State, 19 Ohio St. 188, where a similar question arose,

"neither the infant, nor any person who would in the absence of such commitment be entitled to his custody and services, will be without a remedy." The statute itself, as well as the provisions relating to habeas corpus, provides an adequate and complete remedy. In such a direct proceeding, the commitment does not operate to restrict the power of the court on habeas corpus, to inquire fully into the cause of the detention, and to determine upon the whole case whether the parent is entitled to the custody of his child.

The court below should have fully heard this case upon its merits, the commitment being in due form, and, if the father was not a suitable person to have the care of these children, should have remanded them to the custody of defendants, until legally discharged. The authority of the state, as parens patriæ, to assume the guardianship and education of neglected homeless children, as well as neglected orphans, is unquestioned. The institutions of public charity, for this purpose, in this state, are a subject of just pride to every citizen. The provisions of law under which these institutions are maintained should receive such a construction as will not defeat their humane intention. So long as the management of these institutions is held to public account, and is amenable to the courts, there need be no apprehension that personal rights will be infringed, especially where, as in this case, direct and ample remedies by habeas corpus are provided for the protection of the legal rights of parents and others.[6]

Judgment reversed, and cause remanded.

PEOPLE ex rel. SCHWARTZ v. McLAIN.

Supreme Court of Illinois, 1905. 38 Chi. Leg. N. 166.[7]

BOGGS, J. This is a petition for a writ of habeas corpus, filed originally in this court. The petition avers that Samuel Schwartz, a son of the petitioner of the age of fourteen years, is unlawfully restrained of his liberty by the respondent, Nelson W. McLain, in his official capacity of superintendent of the St. Charles Home for Boys.

It appears from the pleadings on which the cause has been submitted for decision, that the relator, Joseph Schwartz, is a resident, and on the 20th day of June, 1905, was a resident of the city of Chicago; that he was the head of a family consisting of himself, his wife, Rachel, and their son, Samuel; that he, the relator, provided his wife and said Samuel, his son, with a comfortable, quiet and orderly home, and maintained and supplied them with food and clothing and supplied said Samuel with books and stationery, etc., and caused him to

[6] Accord: Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452 (1886).

[7] This case does not appear in the official Illinois reports, having been dismissed upon motion of the petitioner after a rehearing had been granted.

attend the public schools, and that relator in all respects performed and discharged his duties as parent toward said Samuel, and that he, the relator, is a reputable and law-abiding citizen, and that the parents of said Samuel have not been guilty of any act inconsistent with the correct and moral control and custody of their son; that on that day a complaint or petition was filed in the Circuit Court of Cook County, on the chancery side thereof, charging said Samuel with two violations of the provisions of section 55 of the Criminal Code of the State, in that he made "repeated indecent assaults upon Jennie Coliff and other repeated and indecent assaults upon one Fanny Cohen, all within the past two months and in the city of Chicago, county of Cook and State of Illinois; that the said Jennie Coliff and said Fanny Cohen were then and there at the time of said assaults, and each of them was, a female child under the age of fourteen years; that the said Jennie Coliff then and there resided at 72 Wilson street, in said city of Chicago, county of Cook and State of Illinois; that said Fanny Cohen then and there resided at 88 Wilson street, in said city of Chicago, Cook county, Illinois; that said assaults were, and each of them was, publicly committed in the rear of 92 Wilson street, in said city of Chicago, Cook county, Illinois, and said assaults were, and each of them was, an act of disorderly conduct and a notorious act of public indecency tending to debauch the public morals"; that subsequently, in pursuance of proceedings in the said Circuit Court under said petition, a decree was entered finding said Samuel guilty of the acts of disorderly conduct and of public indecency tending to debauch the public morals, charged against him and in violation of said section 55 of the Criminal Code, and declaring said Samuel to be a ward of said court and ordering that he be committed to the St. Charles Home for Boys, there to remain until he should arrive at the age of twenty-one years, unless sooner discharged according to law, and that the respondent restrains said Samuel in said home for boys in virtue of this order of the court.

It appears from the transcript of the proceedings that the order that the boy Samuel should be taken from the custody of the relator, his father, was not on the ground that the relator had in any way failed to provide or care for the said Samuel or had neglected to exercise proper restraint over him, or that his habits or conduct were injurious to the moral or physical interests of the boy, but solely on the ground the boy had, by disorderly conduct and the acts of public indecency before mentioned, violated section 55 of the Criminal Code. The relator and his wife, Rachel, the mother of the boy, were cited to bring Samuel, the son, before the court to answer the charges of disorderly conduct and acts of public indecency, but were not made parties to the proceeding, nor were there before said court any charges of the omission of parental duty and care preferred against them, nor did the order entered by the court proceed on the theory the relator or his wife, Rachel, had by any parental delinquencies lost the right to keep their

son in their family and rear their boy and enjoy his society and receive the benefits of his labor and services. The decree that the boy shall be the ward of the court and should be taken from his home and the custody and care of his parents was based solely on the ground that the boy had committed the misdemeanors aforesaid in violation of the provisions of said section 55 of the Criminal Code, the violation whereof said section 55 provides shall be punished by the infliction of a fine in any sum not exceeding $200 for each offense.

The proceedings in the Circuit Court which resulted in the decree committing the said Samuel Schwartz to the St. Charles Home for Boys was in pursuance of one of the provisions of the act of the General Assembly entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," in force July 1, 1899. 4 Starr & C. Ann. St. Supp. 1902, p. 375. In order to accomplish the purposes indicated in the title, the act provides that a petition in writing, verified by affidavit, may be filed in the Circuit or County Court, setting forth facts showing that a child in the county is either neglected and dependent or delinquent, and praying for proceedings to be had and taken under said petition for the disposition of such child as shall be found to be neglected and dependent or delinquent. Section 1 of the act defines a delinquent child as follows: "The words 'delinquent child' shall include any child under the age of sixteen (16) years who violates any law of this State or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill-fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated." Section 9 of the act purports to authorize the court to commit any child so found to be delinquent, if a boy, to a training school for boys, or to "any institution within the county, incorporated under the laws in this state that may care for delinquent children, * * * or to any state institution which may be established for the care of delinquent boys." It was in virtue of this provision of the said act that the said Samuel Schwartz was ordered by the Circuit Court of Cook county to be taken from the custody of the relator, his father, and committed to the care of the respondent, as the superintendent of the St. Charles Home for Boys, on the ground that the boy had violated, in the manner hereinbefore related, the provisions of said section 55 of the Criminal Code, and had thereby become deemed to be a delinquent boy within the meaning of said statute.

If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of sixteen years who has committed a misdemeanor punishable under the Criminal Code of the state by fine, or who has violated an ordinance of any city or village of the state, and take him from his home and from the custody of his father and the care of his mother and commit

him to a state institution which may be established for the care of delinquent boys and there keep and train and raise him, though the father may have always provided a comfortable, quiet, orderly and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render to him all of the duties of a parent. We do not think it is within the power of the General Assembly to thus infringe upon parental rights. At the common law and at the time of the adoption of the constitution of 1870, the father possessed the legal right to the care, custody and control of his minor children and was entitled to the services and earnings of such children. These parental rights cast upon the father, as a corresponding obligation, the duty to maintain, support and educate the children and to treat them with kindness and affection. Section 1 of the Bill of Rights (Const. 1870, art. 2, § 1) guarantees protection to the inherent and inalienable rights of men, among these rights being "the pursuit of happiness," and section 2 of the same article of the constitution protects the parent against the destruction of his property rights in the services of his child without due process of law.

The right of the parent to the care and custody of the child has its foundation in the love and affection which nature has implanted in the heart of the father for his offspring. It is one of the strongest and deepest emotions of the human mind and heart, exists as a prompting of nature for the protection and safety of the child, and conduces largely to the happiness of the parent. It is difficult to define "pursuit of happiness" but it is clear it comprises the right to enjoy the "domestic relations and the privilege of the family and the home." Black on Constitutional Law, § 204. To guarantee to a parent the right to the pursuit of happiness forbids that he should be deprived of the right to the custody, the association and the society of his child, or of his right to teach and train the mind of the child and fit it for the walks of life, unless considerations affecting the public welfare require such rights shall be abridged or surrendered for the general good of the state. The parent may, by reason of his failure to appreciate and perform that which is requisite to the moral, intellectual and physical welfare and development of the child, forfeit his right to the custody and care of his child. The public welfare is concerned in the culture, education and moral training of children, and the state may supplant the parent as custodian and protector of the child if the delinquencies or unfitness of the parent require that the child shall be deemed the ward of the court, acting for the public. The child may be found to be so possessed of and controlled by wicked degeneracy or so incorrigibly evil, and the parent so indifferent to the moral and intellectual growth of the child or so otherwise unfit to be entrusted with the power to train and cultivate the mind and conscience of the child, that it may become lawful to commit the child to the public care and custody. In such an event the right of the parent may be deemed sec-

ondary to that of the general public as organized for the safety and welfare of mankind. But no such public considerations are here shown to exist. The boy Samuel has been shown to be guilty of offenses which in an older and more matured person would be but a misdemeanor, punishable only by a fine of not exceeding $200 for each offense. He is not a dependent, neglected child. His father has not by any act or omission on his part forfeited his right to care for and enjoy the society of and train his son for the duties and responsibilities of manhood. That extraordinary exigency which may justify the state in supplanting the father as the natural custodian and protector of his son does not here exist.

The property right of the father in and to the services and labor of his son during his minority would also, under the circumstances of this case and under the proceedings here under consideration, to which the father was not a party, be unlawfully infringed by the assumption on the part of the state of the control and custody of the son on the mere ground that the son had committed the misdemeanor in question. The statute here relied upon to justify the detention of said Samuel as a delinquent child, under the circumstances of the case, infringed the constitutional rights of the father and can not be enforced. What is here said has no reference to the statute regulating the disposition to be made of "dependent or neglected" children.

Moreover it is to be understood we do not hold the statute regulating the disposition to be made of delinquent children to be unconstitutional in toto and as to every parent or as to all children, but that under the circumstances of this particular case constitutional rights of the father have been infringed, and therefore the detention of Samuel Schwartz in the St. Charles Home for Boys cannot be justified or upheld.

There is no force in the contention so strenuously advanced by counsel for the relator that the proceedings under this statute are criminal proceedings, and that a boy who is the subject of judicial investigation der this statute is entitled to a trial by a jury of twelve men.[8] The proceeding is statutory, and its object is not the enforcement of the criminal law but the protection of children. Infants are, in general, in a sense wards of courts of chancery, and the practice and procedure in causes under this statute, affecting, as they do, the care and custody of minors and being for the protection of infants, should be that of courts of equity so far as consistent with the provisions of the statute. The commitment to the home for boys, in cases in which the statute is applicable and is properly enforced, is not imprisonment as punishment for the violation of the criminal laws of the state or the ordinances of cities and villages, but is merely the assumption by the state in its capacity of parens patria, of parental authority for the education

[8] Accord: Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, 5 Ann. Cas. 92 (1905).

and reformation of the child, and the home for boys is not to be regarded as a prison, but is, in fact, a home and a school established by law for the benefit and good of those who are found, under the provisions of the statute, to stand in need of parental care and means of reformation and intellectual and moral training. Such is the general view of statutes and institutions of this character. Petition of Ferrier, 103 Ill. 367, 43 Am. Rep. 10; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; House of Refuge v. Ryan, 37 Ohio St. 197; Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388; Scott v. Flowers, 60 Neb. 675, 84 N. W. 81; In re Mason, 3 Wash. St. 609, 28 Pac. 1025.

The provisions of section 2 of the act prescribing the procedure as to trial by jury is constitutional and valid. Petition of Ferrier, supra.

The judgment of this court will be, that the detention of said Samuel by the respondent, in his official capacity as superintendent of the St. Charles Home for Boys, is without sufficient warrant of law, that the relator is entitled to the custody of said Samuel, his son. Judgment will therefore be entered awarding the custody of said Samuel Schwartz to the said relator according to the prayer of his petition. Writ granted.[9]

STATE v. CAGLE et al.

Supreme Court of South Carolina, 1918. 111 S. C. 548, 96 S. E. 291.

Appeal from General Sessions Circuit Court of Greenville County.

Arthur Cagle and Sergeant Moore were convicted of petit larceny and sentenced to the state industrial school, and they appeal. Affirmed.

HYDRICK, J. Appellants are boys of the ages of 8 and 10 years. They were tried with John Taylor, another boy, of the age of 12 years, on the charge of housebreaking and larceny in the night-time. Taylor pleaded guilty. For Cagle and Moore the plea of not guilty was entered by their attorney, on the ground that they were incapax doli from age. The jury found all the defendants guilty of petit larceny. Upon consideration of the circumstances of the case, as disclosed by the testimony, and upon investigation of the previous record of the defendants, the court committed them to the state industrial school at Florence, "until they arrive at the age of 21 years, unless sooner discharged upon probation or parole, as provided by law," Cagle and Moore appealed, alleging error in the sentence.

They contend: (1) That under section 994 of the Criminal Code the

9 The Illinois statute, in question in this case, was amended (Laws Ill. 1907, p. 70) to meet the objections made in this opinion, and was held constitutional in Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222 (1913).

court was not authorized to commit them to the state industrial school, until they attain their majority, without the consent of their parents; and (2) that as the sentence prescribed by statute for petit larceny in ordinary cases is imprisonment for not more than 30 days, and as an adult could not have been sentenced to imprisonment for a longer time, the statute under which they were committed for a longer time is unconstitutional, because it denies to them the equal protection of the laws.

Section 994, Cr. Code, reads:

"When any white boy between his eighth and seventeenth birthday, shall have been tried and convicted of any crime punishable by imprisonment in the state penitentiary or in jail, or by hard labor for the county, by any court or magistrate of this state, such court, or magistrate may, if of opinion that the interest of such boy would thereby be promoted, sentence such boys to commitment to such school, in lieu of such imprisonment or hard labor; or he may remit such sentence upon condition that said boy be voluntarily committed by his parents or guardian, or the person having charge of him (or by such boy himself, if he have no one to care for him), to the custody of said institution until he reach the age of twenty-one years."

The language of the statute plainly authorized the sentence imposed without consent of the appellant's parents. The alternative provision, that the court may remit the sentence, on the condition specified, is permissive only, and therefore discretionary.

As the court found from the facts and circumstances of the case brought out at the trial, and from an investigation of the previous records of the appellants, that their interests would be promoted by the sentence imposed, and as the evidence upon which that conclusion was reached is not before us, we are bound to assume that the discretion was wisely exercised.

There can be no doubt that the Legislature has the power, under the state and federal Constitutions, to classify crimes and criminals, and provide for differences in the extent or degree of punishment for crimes of the same class, according to the circumstances, and for differences in the treatment or punishment of criminals of different classes for the same crime, provided such classification be reasonable, and all offenders of the same class be subject to the same treatment. Graham v. West Virginia, 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917. In that case, it was held that the Fourteenth Amendment did not introduce a factitious equality, without regard to practical differences that are best met by corresponding differences of treatment; and a state statute, under which life imprisonment had been imposed, on the ground that defendant had twice before been sentenced to confinement in a penitentiary, was sustained.

Classification may be based upon the nature of the offender as well as upon the nature of the offense. There are many sound reasons for basing it upon the age of the offender. If habitual criminals may be put into a class and imprisoned for life, in order that society may be

protected against them, there are stronger reasons why youthful offenders should be put into a class, and kept at school, until they attain their majority, in order that they may be given the benefit of that training and guidance which may reform them and make them fit for citizenship.

Society has learned from experience that preventive justice is preferable to punitive justice, and more effective for its protection. And so the chief end of punishment—especially of youthful offenders—has come to be reformation, which was the manifest purpose of the Legislature in founding the school to which these appellants were committed. Reformation requires time—more in some cases than in others. Therefore the Legislature, in its wisdom, left it to the managers of the school to determine when it has been accomplished, within the limit of time prescribed by the statute, with authority to discharge or parole those placed under their tuition, when, in their judgment, the purpose intended has been accomplished.

It is scarcely necessary to add that their discretion is not arbitrary, but subject to supervision, revision, and control in the manner prescribed by law. Statutes providing for indeterminate sentences of all classes of criminals, within reasonable limits, for the purpose of effecting their reformation, have been very generally sustained as within the power of the Legislature, and as violative of no constitutional right. 8 R. C. L. pp. 261, 267; Woods v. State, L. R. A. 1915F, 531, and note.

The state is vitally interested in its youth, for in them is the hope of the future. It may therefore exercise large powers in providing for their protection and welfare. Such statutes are beneficial and remedial, and entitled to favorable and liberal construction; and it is not a valid objection to them that, within reasonable limits, they may deprive children of their liberty or their parents of their custody and the rights usually incident to it. 14 R. C. L. pp. 273, 277. The welfare of the child is superior to the rights of its parents. Whalen v. Olmstead, 15 L. R. A. 593, and note.

We have no doubt of the general power of the state, as parens patriæ, to make and enforce reasonable laws looking to the education, welfare, and protection of its youth. But, in addition to that power, the Constitution (article 12, § 7) has expressly conferred upon the Legislature authority to establish and maintain a reformatory for juvenile offenders. By necessary implication, that authority includes the power to enact such laws and establish such rules and regulations with respect to such an institution and its management, and those who may be committed to it, as may reasonably be deemed necessary or proper for the accomplishment of the purpose intended.

Judgment affirmed.[10]

10 Accord: Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, 5 Ann. Cas. 92 (1905); Sylvester v. Commonwealth, 253 Mass. 244, 148 N. E. 449 (1925); Hills v. Pierce, 113 Or. 386, 231 P. 652 (1924); Childress v. State, 133 Tenn. 121, 179

GARY, C. J., and FRASER and GAGE, JJ., concur.

WATTS, J. I dissent. I do not believe that the courts have power to enlarge the punishment of a child convicted of petit larceny, so as to inflict upon him such fearful punishment. The court can only sentence for 30 days; that is the maximum sentence.

S. W. 643 (1915). See, also, Givardi v. Juvenile Court of Sixth Judicial District (R. I.) 142 A. 542 (1928).

A state statute requiring all children to attend the public schools, and thus destroying private and parochial schools, is unconstitutional as an unreasonable interference with the rights of parents to control the education of their children, and as depriving the proprietors of such schools of property without due process of law. Pierce, Governor of Oregon, v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468 (1925). See, also, Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446 (1923), and Farrington v. Tokushige, 273 U. S. 284, 47 S. Ct. 406, 71 L. Ed. 646 (1927), on the control of parents over the education of their children.

CHAPTER 2

OBLIGATION OF PARENT TO SUPPORT CHILD

SHELTON v. SPRINGETT.

Court of Common Pleas, 1851. 11 C. B. 452.

Assumpsit for meat, drink, washing, lodging, and other necessaries found and provided by the plaintiff for the defendant's son.

Plea, non assumpsit.

At the trial at the sheriff's court, London, on the 29th of May last, it appeared, that the plaintiff kept a coffee-house in the Minories; that the defendant, who was the manager of the Tenterden branch of the London and County Joint-Stock Bank, in April, 1850, sent his son, a youth of the age of twenty years, to London, to look out for a ship, giving him £5., and telling him to put up at an hotel called Burrell's Hotel, at which he himself was in the habit of putting up when he came to town; that, after staying at Burrell's Hotel for a week, at an expense of £3. 9s. (which sum he procured from a friend of his father's), the defendant's son went to the plaintiff's coffee-house, and remained there fifteen weeks.

The son, who was called as a witness, stated that he went to the plaintiff's house without his father's knowledge; that he was recommended by some one to go there, as it would be more economical, and nearer to the docks than the house to which his father had desired him to go; that he had addressed two or three letters to his father, but had received no reply; that he could not say how he had spent the £5. which his father had given him, but no part of it in board and lodging.

Some correspondence was then put in, but it contained nothing from which a contract or promise on the part of the defendant to pay for his son's board and lodging, could be implied.

For the defendant it was submitted, on the authority of Mortimore v. Wright, 6 M. & W. 482, that the moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and that he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them; and, consequently, that here there was no case to go to the jury.

On the other hand, reliance was placed upon Baker v. Keen, 2 Stark. N. P. C. 501, where it was held, that, where a minor orders articles which are necessary, and suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given by the father to the son so to contract.

The undersheriff, reserving to the defendant leave to move to enter a nonsuit, left the case to the jury; telling them that it was incumbent on the plaintiff to shew that the defendant had given authority to the son to pledge the defendant's credit, and that the board and lodging had been supplied on the credit of the defendant.

The jury returned a verdict for the plaintiff, damages £15. 15s.

JERVIS, C. J. I am of opinion that this rule must be made absolute. It is well settled that a father is not, without some contract express or implied, liable for necessaries supplied to his son. Lord Abinger, in Mortimore v. Wright, says: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law." To that doctrine I entirely subscribe. If a father turns his son upon the world, the son's only resource, in the absence of anything to shew a contract on the father's part, is, to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty. The simple question, therefore, in this case, is, whether there was any evidence whatever of authority to charge the defendant. The evidence is, that the father starts his son for London in search of a ship, with £5. in his pocket, and advises him to go to one hotel, and the son goes to another. There really was no evidence to go to the jury—that is, no reasonable evidence which ought to have been submitted to the judgment of the jury.

MAULE, J. I am of the same opinion. People are very apt to imagine that a son stands in this respect upon the same footing as a wife. But that is not so. If it be asked, is, then, the son to be left to starve, —the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support. That is the course which the law points out. But the law does not authorize a son to bind his father by his contracts. Upon the evidence in this case, it is clear there was a total absence of authority in the son to contract on the part of the father the debt now sued for. (The plaintiff originally contracted with the son, intending to trust to him for payment.) There is nothing in the correspondence from which we can infer an intention on the father's part to confer authority upon the son to contract a liability for him. The letter written by the defendant's attorney does not admit, or give any colour of admission of, an original liability. I think there is not even what is called a scintilla of evidence. But it is quite clear that there is not such evidence as would justify a jury in finding a verdict for the plaintiff. I therefore agree with my lord, that the rule must be made absolute to enter a nonsuit.

CRESSWELL, J. I am entirely of the same opinion. The under-

sheriff ought to have nonsuited the plaintiff, or told the jury that there was no evidence to warrant them in finding for him.

TALFOURD, J., concurred.

Rule absolute.

GORDON v. POTTER.

Supreme Court of Vermont, 1845. 17 Vt. 348.

Book account. Judgment was rendered against the defendant by default, and an auditor was appointed, who reported, in substance, as follows. The plaintiff presented an account against the defendant for cloth and trimmings for a suit of clothes, delivered by him, in June, 1841, to Augustus Potter, the minor son of the defendant. At the time of the sale the son was at work by the month for one Russell, in Shrewsbury, by permission of the defendant, who resided in Plymouth. The plaintiff, before the sale, knew where the defendant resided, and was informed by Russell that he was to furnish the son with some clothing, when the time was out for which he was to work, which would be the first of October following, and that, if he, plaintiff, sold the clothing to the son, he could not pay him for them before the first of October. It appeared that defendant told his son, in the spring, to go out to work, and that in the fall he would get him some winter clothes; and it did not appear that he refused to get the clothes for his son, but that he neglected to do so. It further appeared that the defendant knew of the purchase made of the plaintiff by the son, and that he furnished to the son one dollar in money, with which to pay for making up the clothes, and gave him a part of his earnings, and that he permitted the son to wear out the clothes. The county court rendered judgment for the defendant, upon the report; to which decision the plaintiff excepted.

The opinion of the court was delivered by

REDFIELD, J. This case presents the question, how far a parent is liable for necessaries furnished to his minor child. The report of the auditor, which is the basis of the judgment below, which we are now revising, seems to leave the case defective in many particulars, as against the father. It does not appear, except by way of inference, that the articles charged were furnished upon the credit of the father, or, in other words, that the plaintiff, at the time they were delivered to the son, expected the father to pay for them. And I take it to be well settled law, that, if one trades with the son, and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus delivered. And this is upon the ground that, if one trade with the agent, and give credit to him personally, knowing of his agency, the principal is not liable.

But there is one defect in the case, which we think must clearly and indisputably preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly

or by implication, to pledge his credit for the articles; but the contrary. And, unless the father can be made liable for necessaries for his infant child against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and dicta of judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessaries for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion. Chancellor Kent (2 Com. 191) says, "During the minority of the child the parent is absolutely bound to provide reasonably for its maintenance and education, and he may be sued for necessaries furnished and schooling given to a child, under just and reasonable circumstances." Chief Justice Swift (1 Dig. 41), uses much the same language. None of the cases referred to by these writers justify the language used. Van Valkinburgh v. Watson (13 Johns. 480) is relied upon by both these writers to sustain their position. But the decision in that case was in favor of the father. The court say, indeed, that, had he absolutely refused to furnish necessaries to his minor child, he might be made liable for them, when furnished by a stranger. But the decision involved no such question, and called for no such declaration. Chancellor Kent refers to Stanton v. Willson, 3 Day, 37, which, although a Connecticut case, is not adverted to by Chief Justice Swift; from which we conclude he did not esteem it in point. The rule laid down in this last case is broad enough to make the father liable, against his will. "When an infant child elopes (?) from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education, furnished to such child by a stranger." But the case before the court was where the necessaries had been furnished to the child by consent of the legally constituted guardian, the mother, after a divorce a vinculo. Chancellor Kent also refers to Simpson v. Robertson, 1 Esp. Cas. 17. But this case merely decides, that the father is not liable for articles of clothing furnished to the son by a tailor, "who colludes with the son, and furnishes him with clothing to an extravagant degree." Ford v. Fothergill (Id. 211) is also referred to by Chancellor Kent. But this was a case against the son, and the only question moved in the case was as to the extent of the liability of an infant for necessaries. Stone v. Carr, 3 Esp. Cas. 1, is likewise referred to by Chancellor Kent. This case only determines the extent of one's liability for necessaries furnished to his wife's children, by a former husband, when they form a portion of his family. No other authorities are referred to, and it is presumed none other exist, or they would not have been overlooked by such an indefatigable reviser as the learned Chancellor, whose opinions are, in our American courts, deemed law, and are sought with almost equal avidity by the proprietors of railroads, and by the impeachers of presidents. But, notwithstanding the usual accuracy of the learned commentators referred to, it needs no farther argument to show, that their opinion, on this point, is without the support of any decided case.

MAD.D.R.

An examination of the English cases, upon this point, will show, that the parent cannot be made liable for necessaries, furnished to his child, without his consent, either express or implied. The case of Bainbridge v. Pickering, 2 W. Black. 1325, is the same, almost, as that already quoted from 13 Johns. 480. But the opinion of the court shows more the sense of the English courts upon the important matter of family government. Gould, J., says: "No man shall take upon him to dictate to a parent, what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother." In the case of Baker v. Keen, 3 Eng. C. L. 505, 2 Stark. R. 501, which was tried before the late Lord Tenterden, then Chief Justice Abbott, it was held, that, when a minor "orders articles, which are necessary to his condition in life, it is a question for the jury under all the circumstances in the case, whether they can infer an authority given to that effect by the father." The Lord Chief Justice says, "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied." In Fluck v. Tollemache, 12 Eng. C. L. 15, 1 Car & P. 5, it is held, that a "father is not bound to pay for clothing furnished to his son, without some contract, express or implied, on his part, to do so." Borrough, J., says, "An action can only be maintained against a person for clothes, supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first supplied without his knowledge, and he has adopted the contract afterwards." Rolfe v. Abbott is to the same point. 25 Eng. C. L. 436, 6 Car. & P. 286. Baron Gurney told the jury that, "to charge the father, it is essential that the goods should have been supplied with his assent, or by his authority." In Law v. Wilkin, 33 Eng. C. L. 378, 6 Adol. & El. 718, the same rule is confirmed, although a new trial is there granted, upon the ground that the case should have been submitted to the jury. From which we conclude such is the acknowledged rule of law in Westminster Hall, or so many of the judges would not be found so unanimous in declaring it. And it is obvious, that it makes no provision for strangers to furnish children with necessaries, against the will of parents, even in extreme cases. For, if it can be done in extreme cases, it can in every case where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessaries, suitable to the varying taste of the times. There is no stopping place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this state, is not the right of every intermeddling stranger.

The following English cases serve to show still more clearly, the opinion entertained there upon this subject, than the earlier cases. Blackburn v. Mackey, 1 Car. & P. 1, 12 Eng. C. L. 13, decides that "a father

is not liable for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied." The proof in that case was that the son was in want of clothes, and his father did not furnish him with any, or with money, and he obtained them of the plaintiff. Abbott, C. J., says: "The question deeply affects society; for, if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man, who had a family, might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express or implied." In Seaborne v. Maddy, 9 Car. & P. 497, 38 Eng. Com. L. 294, it is decided, that "no one is bound to pay another for maintaining his children, unless he has entered into some contract to do so. Every man is to maintain his own children, as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action." This was as late as 1840, before Mr. Baron Parke. In a note to this case, I find a report of the case of Mortimore v. Wright, from the London Law Journal, vol. 9, Excheq. p. 158, in which it was decided, in the exchequer chamber, upon writ of error, that a father is not liable for debts incurred by his son, while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation he is under to support his children infers no such liability. In that case Lord Abinger, C. B., said: "In point of law, a father, who gives no authority and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger, would be. The mere moral obligation upon a father to maintain his child (which I by no means deny) affords no inference of a promise to do so. In order to bind a father for a debt incurred by his son, you must prove that he has contracted to be bound, in the same manner you would prove such a contract against any other person; and it ought not to be left to juries to make the law in each particular case, according to their own feelings or prejudices." Baron Parke says: "It is a clear principle, that a father is not under any legal obligation to pay his son's debts, unless he has contracted so to do, except, perhaps, under the 43 Eliz., under which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability."

In this case all the former cases are elaborately reviewed, and many of them limited and qualified, and the foregoing may be considered the settled law in Westminster Hall, so late as 1840. It need not be remarked how precisely it corresponds with the view we had taken of what the law was, and what it should be. The laws are made and administered by young men far more in this country than in England, but it is to be hoped that will not induce us to depart from so salutary a rule of law as that giving the father the control of his own household and property. There is full enough disposition of late to subject fathers to the caprices, or the excesses and extravagance, if not the domination, of thoughtless and heartless sons, in concurrence with others, who subsist

by deluding and destroying sons, who might otherwise be sober and decent. One could hardly desire to see the tendencies in that direction increased. A father, who supports his family, ought, it would seem, to be consulted as to the mode in which it shall be done; and, if he will not support them, "being of ability," the statute points out the remedy the same in this state as in England. I know the law is different as to the wife, and there are substantial reasons why it should be. She may always buy necessaries on her husband's credit, if he turn her off, without her fault, or refuse to find her a suitable maintenance at home. Judgment affirmed.[1]

COOPER v. McNAMARA.

Supreme Court of Iowa, 1894. 92 Iowa, 243, 60 N. W. 522.

Appeal from district court, Woodbury county; A. Van Wagenen, Judge.

Action to recover the value of board and the use of a room furnished by the plaintiff to the minor son of defendant. There was a trial by the court on an agreed statement of the facts, and a judgment for plaintiff for the amount of her claim. The defendant appeals.

ROBINSON, J. The cause is submitted in this court on a certificate of the trial judge, which shows facts as follows: The defendant has been married twice, the first time to A. W. Fowler. In April, 1873, she gave birth to a son, named Arthur Fowler. In 1886 she was divorced from her husband, and by the decree of divorce she was awarded the custody of the son. Soon after that time, Arthur commenced working for himself, under an agreement with his mother that he should receive all his wages. From that time until November, 1890, he worked continuously, received his wages, and clothed and provided for himself, except that he slept at the home of his mother, and she washed and mended his clothes without compensation, and did not receive any part of his wages. After about the 1st of November, 1890, he worked during a short time for his father. Since that time he has not had continuous employment, but has had the money which he earned for his own use. He is large and healthy. In March, 1891, his mother, having married again, moved to Sloan, where she has since resided. She has a comfortable home there, and at all times has been willing that Arthur should

1 Accord: Hunt v. Thompson, 3 Scam. (4 Ill.) 179, 36 Am. Dec. 538 (1841); Gotts v. Clark, 78 Ill. 229 (1875); McConnell v. Lamontagne (N. H.) 134 A. 718 (1926) semble. But see the case last cited, and Lamson v. Varnum, 171 Mass. 237, 50 N. E. 615 (1898), where the courts were liberal in finding an agency in fact, from the evidence.

There are statutes in most of the states making a father's neglect to support minor children, who are unable to support themselves, a criminal offense. For collections of cases upon some questions which have arisen under these statutes, see notes in 23 A. L. R. 864, and 24 A. L. R. 1075.

remain with her, and has been ready to provide for him in a suitable and proper manner. When she moved to Sloan, he remained in Sioux City, to obtain work for himself, and continued there until on or about the 21st day of January, 1892. The defendant never agreed to pay his board and expenses when away from her home, nor said that she would be responsible for him in any manner. During that time her son was furnished the use of a room and board by the plaintiff, of the value of $131.27, for which he has paid only the sum of $48. The plaintiff had no knowledge that Arthur was working for himself and collecting his wages, and made no inquiry of him nor of any one else in regard to that matter, but knew, while he was boarding with her, that the defendant resided at Sloan.

It is said by the appellee that Porter v. Powell, 79 Iowa, 151, 44 N. W. 295, is decisive of this case. The cases are similar in some respects. In each case the minor was away from home with the express or implied consent of the parent, and in each the earnings were controlled by the minor. In neither case did the parent furnish or agree to furnish the minor with means of support, nor had the parent in either case formally emancipated the child, or expressed an intention not to be liable for necessaries which might be furnished it. But in the Porter Case the minor had a severe attack of a dangerous disease, and required the services of a physician. The occasion was not one which admitted of delay and investigation, nor was it in any proper sense optional with the physician whether he would perform the services required. The dictates of humanity and the necessities of the minor made it the duty of the physician to comply with her request, and render her the services demanded. In deciding the case, it was said that the duty of the parent extended only to the furnishing of necessaries; that what are necessaries in a given case must be determined by the facts in that case; and that what would be necessary for a child in sickness would not be necessary in health. It was also said, in substance, that the facts did not show an intention on the part of the parent not to be responsible for the support of his child if, in consequence of sickness or accident, she should be unable to support herself. This case does not involve an emergency in which the needs of the minor were great and urgent, requiring immediate attention. We may presume that the son of the defendant was able, if he could obtain employment, to support himself; that he had left home for that purpose, and had been given full control of his earnings. It is the right of the parent, in the exercise of a reasonable discretion, to control the minor, to determine where he shall reside, and what he shall do. It is the duty of the parent to provide his minor child with the necessaries of life, and, in the absence of evidence to the contrary, it will be presumed that the minor is subject to the control of the parent, although away from his home, and that the liability of the latter for necessaries furnished the minor continues. In this case it is not questioned that the board and room furnished the minor were necessaries. So far as is shown, he was under the control of his mother

while he was boarding with the plaintiff. His mother was willing to furnish him a home with her; yet, so far as the certificate shows, he may have remained in Sioux City, not only with her consent, but by her desire, to obtain employment and support himself so far as he could do so, and to that extent relieve her of the obligation to furnish him support. The facts certified do not show that the son was emancipated, nor that the defendant had decided not to furnish him further support. They do not show that he had ever supported himself wholly, nor that the defendant expected him to do so. She really claims exemption from liability in this case on the ground that her son was able to work, was away from home, and controlled his earnings. But it is not the law that the parent is obliged to support a minor child only when he is at home, or is unable to work for his own support, or when his earnings are given to the parent. If, however, the minor refuses to remain at the place of residence his parent has provided for him, and there receive the support to which he is entitled, and, in violation of the wishes and direction of the parent, makes his home elsewhere, a question as to the liability of the parent for the support of the minor child might well arise.[2] But this is not a case of that kind. Nothing contained in the certificate of the judge rebuts the presumption, which the law authorizes from the facts shown, that the liability of the defendant for the support of her son continued while he was boarding with the plaintiff. We conclude that the certificate shows facts which justified the district court in rendering the judgment in question, and it is therefore affirmed.

BALDWIN v. FOSTER.[3]

Supreme Judicial Court of Massachusetts, 1885. 138 Mass. 449.

HOLMES, J. There was evidence that the defendant's wife left him without cause, taking their child with her; that the defendant was able and willing to furnish the child with a suitable home, and to support it; that he notified his wife and the plaintiff that he was so able and willing; and that, when he was absent from the state, he arranged to have his letters forwarded so that he could always be reached through the mail. If this evidence was believed, there was no ground of necessity or implied authority on which the wife could pledge the defendant's credit to the plaintiff. Dodge v. Adams, 19 Pick. 429; Hancock v. Merrick, 10 Cush. 41; Reynolds v. Sweetser, 15 Gray, 78, 81. See Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118.

In Bazeley v. Forder, L. R. 3 Q. B. 559, it was conceded that a

2 See Raymond v. Loyl, 10 Barb. (N. Y.) 483 (1851), that there is no duty of support in such cases.

3 The statement of facts is omitted. The action was one of contract for board, lodging, and clothing furnished by the plaintiff to the six year old child of the defendant.

wife had no power to charge her husband for the support of a child, unless she was living apart from him justifiably, and her power to do it in that case was put on the ground that the reasonable expenses of the child were part of her reasonable expenses.[5] But assuming it to be true, as laid down in several more or less considered dicta, that the law of Massachusetts imposes a duty upon a father to support his children, and that, when he wrongfully turns wife and children out of doors, his liability for the latter arises out of that duty (Reynolds v. Sweetser, ubi supra, and Brow v. Brightman, 136 Mass. 187, 188), still all the cases cited show very plainly that, when the wife leaves without cause, taking her child with her, the fact that her husband does not attempt to compel her to give up the custody of the child does not of itself authorize her to bind him for its support.[6] The contrary suggestion to the jury in Rawlyns v. Vandyke, 3 Esp. 250, 252, was made in a case where the husband was regarded as substantially in the position of having turned his wife away, and at a time when fathers had an absolute right to the custody of their children, and could obtain possession of their persons by habeas corpus. Under our statutes, the rights of the father and mother, in the absence of misconduct, are equal, and the happiness and welfare of the children determine their possession. Pub. Sts. c. 147, § 36; c. 146, § 32. See Dumain v. Gwynne, 10 Allen, 270, 272.

The rulings requested by the plaintiff were wrong, and the instructions given were sufficiently favorable for him. See, further, Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499.[7]

Exceptions overruled.

[5] The right of the wife to purchase necessaries upon her husband's credit under these circumstances is considered hereinafter, at page 461 ff. In accord with Bazely v. Forder, as to her legal authority to purchase necessaries for a child upon his credit, see Leibold v. Leibold, 158 Ind. 60, 62 N. E. 627 (1902); Reynolds v. Sweetser, 15 Gray (Mass.) 78 (1860); Walker v. Laighton, 31 N. H. 111 (1855).

[6] But, where the wife is living apart on account of the husband's fault, an actual authority to pledge his credit for the support of the children may, if necessary, be found from his acquiescence in their remaining in her custody. McMillen v. Lee, 78 Ill. 443 (1875); Rumney v. Keyes, 7 N. H. 571, 580 (1835).

[7] See Maschauer v. Downs, 53 App. D. C. 142, 289 F. 540, 32 A. L. R. 1461 (1923), holding that the fault of the wife could not affect the right of the children to support, and that the plaintiff, who furnished them with necessaries, could recover from the husband; and Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73 (1856), where the wife, though at fault, was considered as the husband's agent to secure necessaries for their child.

GILLEY v. GILLEY.

Supreme Judicial Court of Maine, 1887. 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307.

VIRGIN, J. Assumpsit by the mother against the father for their young children's necessary support furnished after a divorce a vinculo decree to her for his "desertion and failure to support," he having been absent from the state several years prior to the decree and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves. Benson v. Remington, 2 Mass. 113; Dawes v. Howard, 4 Mass. 98; Nightingale v. Withington, 15 Mass. 274, 8 Am. Dec. 101; State v. Smith, 6 Me. 462, 464, 20 Am. Dec. 324; Dennis v. Clark, 2 Cush. (Mass.) 352, 353, 48 Am. Dec. 671; Reynolds v. Sweetser, 15 Gray (Mass.) 80; Garland v. Dover, 19 Me. 441; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Furman v. Van Sise, 56 N. Y. 435, 439, 445, 446, 15 Am. Rep. 441; 2 Kent's Com. *190 et seq.; Schoul. Dom. Rel. 321.

In Dennis v. Clark, supra, the court said: "By the common law of Massachusetts, and without reference to any statute a father if of sufficient ability is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England to support and provide for his wife. And if a husband desert his wife or wrongfully expel her from his house and make no provision for her support, one who furnishes her with necessary supplies may compel the husband by an action at law to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency. Reynolds v. Sweetser, supra; Hall v. Weir, 1 Allen (Mass.) 261; Camerlin v. Palmer Co., 10 Allen (Mass.) 539. But a minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account even for necessaries. Weeks v. Merrow, 40 Me. 151; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118. Otherwise a child, impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint. White v. Henry, 24 Me. 533. Moreover in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved but will be presumed

in favor of the father who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere. Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233. "And this rule results from the legal obligation imposed upon him to provide for her support and education which gives him the right to the profits of her labor." Blanchard v. Ilsley, 120 Mass. 489, 21 Am. Rep. 535; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Emery v. Gowen, supra; Furman v. Van Sise, 56 N. Y. 435, 444, 15 Am. Rep. 441.

So also in that large class of cases wherein needed supplies, furnished by the town to minor children between whom and their father, though they lived apart, the parental and filial relations still subsisted, are considered in law supplies indirectly furnished the father—the reason is because he was bound in law to support them. Garland v. Dover, 19 Me. 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held except under the pauper laws of those states which are substantially like our own. Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Gordon v. Potter, 17 Vt. 348.

But as before seen the law was settled otherwise in this state before the separation and has been frequently recognized in both states since; and we deem it the more consistent and humane doctrine.

It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them. Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; 2 Kent's Com. *192; Weeks v. Merrow, 40 Me. 151; Gray v. Durland, 50 Barb. (N. Y.) 100; Furman v. Van Sise, supra, both opinions; Rev. St. c. 59, § 24.

This leads to an inquiry into the effect of the divorce a vinculo alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made then the father would have no right, either to take them into his custody and support them or employ any one else to do so, without the consent of the mother. Hancock v. Merrick, 10 Cush. (Mass.) 41; Brow v. Brightman, 136 Mass. 187; Finch v. Finch, 22 Conn. 410. Although it is held otherwise in some jurisdictions. Holt v. Holt, 42 Ark. 495, and other cases on plaintiff's brief.

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them.

He may, on hab. corp., obtain custody as against their mother, on satisfying the court that he is a fit custodian. Com. v. Briggs, 16 Pick. (Mass.) 203.

It would seem to follow that the divorce alone, while it dissolved the matrimonial relation between the parties thereto, did not affect in anywise the parental relation between them and their children. When the divorce was decreed in behalf of his wife the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that in case of a decree for custody, the father is not holden, impliedly hold that in the absence of any such decree, he is liable. Brow v. Brightman, supra.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued. Carlton v. Carlton, 72 Me. 115, 39 Am. Rep. 307; Webster v. Webster, 58 Me. 139, 4 Am. Rep. 253.

We are of opinion therefore that this action is maintainable on the implied promise of the defendant resulting from the circumstances and the law applicable thereto.

Exceptions overruled.

PETERS, C. J., and WALTON, LIBBEY, EMERY, and HASKELL, JJ., concurred.

HUSBAND v. HUSBAND.

Supreme Court of Indiana, 1879. 67 Ind. 583, 33 Am. Rep. 107.

WORDEN, J. This was an action by the appellant, against the appellee, to recover an alleged indebtedness of two thousand dollars, "for the care, maintenance and support of one Adelia Husband, an infant daughter of the defendant, from the 5th day of March, 1863, to the 1st day of October, 1877, at the special instance and request of the defendant."

The defendant answered that he was the father of the child mentioned, who was the issue of a marriage between himself and the plaintiff; that, on the 4th day of the March term of the court of common pleas of the county of Posey aforesaid, the plaintiff herein obtained in that court a decree of divorce against the defendant herein, and for the sum of fifteen hundred dollars as alimony, and for the custody of said child, and that, during all the time for which the plaintiff sues for the support of said Adelia, the plaintiff, by the order of said court, as aforesaid, against the will and consent of the defendant, and not at his in-

stance and request, assumed and took upon herself the care, custody and support of the said Adelia. Wherefore, etc.

The plaintiff demurred to this answer for want of sufficient facts, but the demurrer was overruled and exception taken. Thereupon, the plaintiff declining to reply, judgment was rendered for the defendant.

The question presented is, whether the court erred in holding the answer good. Does the law imply an obligation on the part of the father to pay his former wife for her support and maintenance of the minor child or children of the marriage, where she has obtained a divorce from him, and has, in the decree, been awarded the custody of such child or children?

This question must, we think, be answered in the negative. The right of the parent to the services of the child, and the obligation of maintenance devolving upon the parent, have been said to be reciprocal rights and obligations. See, as remotely bearing upon this point, the case of Kerwin v. Wright, 59 Ind. 369.

In 2 Bishop, Marriage and Divorce, § 557, it is said:

"The true legal principle applicable to cases of this kind seems to be, that the right to the services of the children and the obligation to maintain them go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation."

There can be no doubt but that the awarding of the custody of the child to the plaintiff, in the decree of divorce, deprived the defendant of his right to her services. He could not command her services while the plaintiff was entitled to her custody. And, if the principle above announced be correct, neither the former wife nor any one else, could maintain an action against the father, for the support and maintenance of the child, while he was thus deprived of her custody and services, on any obligation arising out of duty.

But we desire to pass only upon the point involved in the case before us, and we express no opinion as to the right of a third person to maintain such action.

The statute in force at the time the divorce in question was granted provided that "the court in decreeing a divorce shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." 2 G. & H. p. 353, § 21. The same provision is contained in the present statute. R. S. 1876, p. 331, § 21.

It seems to us to have been clearly intended that the rights of the parties in a proceeding for a divorce, as to the custody and support of the minor children of the marriage, should be settled and determined in that proceeding, and not be left open to further independent litigation.

It cannot be even plausibly contended that if the plaintiff had, in the divorce suit, been awarded a definite sum for the support of the child, she could afterward have maintained an independent action for more.

But it was not necessarily obligatory upon the court to make any allowance to the plaintiff for the maintenance of the child, although her custody was awarded to the plaintiff. The matter rested in the discretion of the court granting the divorce, and was to be determined from the circumstances and the situation of the parties. Conn v. Conn, 57 Ind. 323.

The court may well have thought that the allowance to the plaintiff of the sum of fifteen hundred dollars, by way of alimony, rendered it unnecessary to make her a further allowance for the support of the child. But, if no allowance had been made for alimony, the point here involved would have rested upon the same foundation.

The action for divorce was one in which the plaintiff might, if her case warranted it, and should, have obtained a provision for the support of the child; but, having taken her decree for divorce and the custody of the child without any provision for its support, she took upon herself the burden of its support without such provision, and cannot now maintain an action for such support. She is estopped by the record to claim now what she should have secured, if entitled to it, in the action for the divorce. If the court, in the action for divorce, erroneously refused to make her an allowance, to be paid by her husband, the father of the child, for its support and maintenance, she had her remedy.

We are of opinion that the answer was good, and the demurrer to it properly overruled.

The judgment below is affirmed, with costs.[8]

GEARY v. GEARY.

Supreme Court of Nebraska, 1918. 102 Neb. 511, 167 N. W. 778, 20 A. L. R. 809.

Suit in equity by Alice Geary against William J. Geary. From an order allowing plaintiff a certain sum and requiring payment of a certain sum per month for maintenance and education of defendant's minor children, he appeals. Affirmed.

ROSE, J. As presented on appeal this is an independent suit in equity brought in the district court for Wayne county, Neb., to enforce the duty of defendant to support two of his minor children while in the custody of plaintiff, their mother. To defeat the action defendant pleaded a divorce procured by him in the district court for Plymouth county, Iowa, August 12, 1907, and an executed contract for the payment of alimony. Plaintiff and defendant have eleven children. In the Iowa divorce court three minors were committed to the father and four minors to the mother. The decree of divorce and the contract for alimony are silent on the subject of support for the children.

8 Accord: Hall v. Green, 87 Me. 122, 32 A. 796, 47 Am. St. Rep. 311 (1895); Brown v. Smith, 19 R. I. 319, 33 A. 466, 30 L. R. A. 680 (1895).

The district court for Wayne county, Neb., found that two of the minors committed to plaintiff are self-supporting, but made allowances for the other minors committed to her; their names being Frank Geary and Stella Geary. For the period between the bringing of the present action July 15, 1914, and the entry of the decree October 9, 1916, plaintiff was allowed $1,800. Beginning October 18, 1916, defendant was ordered to pay $30 a month for the support, maintenance, and education of Frank Geary while attending school during his minority, and $30 a month for the support, maintenance, and education of Stella Geary during her minority. It is from this decree that defendant has appealed.

In ordering defendant to support the two minor children named, did the district court for Wayne county, Neb., give "full faith and credit" to the Iowa judgment, within the meaning of that term as used in the Constitution of the United States? This is the question presented by the appeal. On issues raised by the pleadings the following facts are established by the evidence:

Plaintiff and defendant were married in Iowa, June 29, 1881. In a suit in which the district court for Plymouth county, Iowa, had jurisdiction of the subject-matter and of the parties, while both were domiciled in that county and state, the marriage tie was dissolved August 12, 1907. The decree of divorce did not mention alimony for the wife or support for the children, but the custody of four minors, including Frank Geary and Stella Geary, was committed to their mother. The parents had entered into a contract obligating the husband to pay the wife $7,250 in full of all alimony. This sum he subsequently paid but out of it the wife had obligated herself to pay the claims of a number of creditors. He had been a resident of Nebraska five years when sued here. Plaintiff, with the minor children in her custody, had been a resident of Nebraska nearly two years when the decree in her favor for the support of Frank Geary and Stella Geary was rendered. During her entire residence in Nebraska she has been without sufficient means to support, maintain, and educate the minor children named, and they are not self-supporting. Their father is abundantly able to support them, but refuses to perform his paternal duty in that respect. The allowances made by the district court for Wayne county, Neb., are both reasonable and necessary. These facts and those narrated in the preliminary statement herein are fully established by the evidence. The contract for the payment of alimony does not on its face include support for the minor children. In the divorce suit there was no plea for their support or for alimony. The decree of divorce did not touch those subjects.

Under the laws of Nebraska it is the continuing duty of a father to support his minor children and his obligation to do so cannot be evaded by neglect, improper contract, or other unjustifiable means. After parents have been judicially divorced, reasonable and necessary allowances for the support of minor children in the custody of the mother, if not formerly adjudicated, may be made in an independent suit by her

against the father. Resident minor children are wards of the state in whom the government is interested. Education of children is compulsory as a public function. General jurisdiction to protect minors domiciled in the state and to enforce paternal obligations to offspring has been committed by law to the district courts.

Does the Iowa judgment, confined as it is to the divorce and the order relating to the custody of the minor children, suspend the power of the Nebraska court to protect them in an independent suit; parents and children now being residents of this state? The Nebraska court did not attempt to change the divorce or the custody of the children—the only questions adjudicated in the Iowa divorce court. The father argues, however, that the Iowa court first acquired, and afterward retained, jurisdiction to enforce his paternal duty to his minor children, and that their mother is limited to supplemental proceedings in that forum. If this proposition is sound, the state of Nebraska as parens patriæ, represented by the judicial department of government, must withhold from its resident wards needed relief. In that event the mother must leave her home and residence in Nebraska, go into a court in Iowa to procure for the first time an order on a nonresident of Iowa to pay to another nonresident of Iowa money for the support of minors domiciled in Nebraska. If the father's position is tenable, the mother must open up Iowa litigation that has been slumbering in executed judgment for many years, make new pleas, pray for new relief, and adduce new proofs. If she should prevail, the Iowa court would be without power to enforce its new judgment in Nebraska, and in the end she would be required to resort again to the district court for Wayne county, Nebraska. The full faith and credit provision of the federal Constitution does not require her to pursue such a course. The Nebraska court is only required to give to the Iowa judgment the effect to which it is entitled in Iowa. Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Harding v. Harding, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066. In Iowa the decree of divorce is not effective for the purpose of enforcing the continuing duty of the father to support his minor children and the extraterritorial effect is no greater. Mere procedure resulting in a judgment or in the modification thereof is not protected by the full faith and credit clause. That part of the supreme law is directed to the judgment. The power of the Iowa divorce court to make provision for the support of the minor children while they were residents of Iowa was not invoked or exercised. The new conditions which justified the relief granted to the mother by the Nebraska court were not in existence when the Iowa divorce was granted, and could not then have been pleaded or proved. They arose in Nebraska after parents and children became residents of Nebraska. Some courts have gone far enough to hold:

"A judgment of a court of one state awarding the custody of minor children in a divorce proceeding is not res judicata in a proceeding before a court of another state, except as to facts and conditions before

the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently thereto, it has no controlling force, and the courts of other states are not bound thereby." 15 R. C. L. p. 940, § 417; Alderman v. Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

The district court for Wayne county, Neb., however, did not disturb the custody of the children, the divorce of the parents, or the stipulated alimony, but, on changed conditions, enforced only the unadjudicated, continuing duty of the father to support his own children after they and their parents had become residents of Nebraska. This was not a violation of the full faith and credit provision of the federal Constitution.

Affirmed.[9]

HAMER, LETTON, and SEDGWICK, JJ., not sitting.

ESTEB v. ESTEB.

Supreme Court of Washington, 1926. 138 Wash. 174, 244 P. 264, 47 A. L. R. 110.

Action by May B. Esteb against H. L. Esteb to modify decree of divorce. From an order modifying decree, defendant appeals. Affirmed.

ASKREN, J. This is an action to modify a decree of divorce to provide for the support of a minor child. From an order modifying the decree, the husband has appealed. Since the hearing in this court the husband died and the executrix of his estate has been substituted as appellant.

The facts follow: In 1915, respondent secured a divorce from decedent. She was granted the custody of their two minor children, Esther and Carmelita, and provision was made for their support. Thereafter, under appropriate proceedings, the divorced wife was granted a certain amount of community property in settlement of the marriage relation. The older daughter, Esther, has since become of age. The younger, Carmelita, became 18 years of age in July, 1925. The decree originally provided for a certain sum per month for her support until she

[9] Accord, as to the continuing duty of the father, to support the children, after divorce, in which no support was decreed: Desch v. Desch, 55 Colo. 79, 132 P. 60 (1913); Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255 (1898); Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542 (1887); West v. West, 114 Okl. 279, 246 P. 599 (1926); Hartman v. Chumley (Tex. Civ. App.) 266 S. W. 444 (1924). See notes, 17 Ill. L. Rev. 48, 20 Ill. L. Rev. 98, 10 Iowa, L. B. 83, 38 L. R. A. (N. S.) 508, 15 A. L. R. 569, and 52 A. L. R. 286.

The question of whether a mother, after the death of the father, is under a duty to support her minor children, is considered hereinafter at p. 63.

Upon the question of whether, when the father's income is subject to a spendthrift trust, it may be subjected to payment for the maintenance of his minor children, see note, 52 A. L. R. 1259.

reached the age of 18 years, which was the legal age of majority at that time. In 1923, the Legislature, by chapter 72, Laws of 1923, placed the age of majority for females at 21 years. In January, 1925, the respondent brought this action to modify the decree and to require the decedent to contribute to the support of Carmelita the sum of $60 per month.[10]

* * *

(2) The main and serious question in this case is this: Has the court the legal right to compel a divorced father to provide funds for a college education for his minor child whose custody has been given to the mother?

We have never been called upon to decide this precise question before. If the court has this legal right it must be upon the ground that the same is necessary, for the duty of a father to provide for his minor child when the custody be in another is restricted to necessaries.

From earliest times the question of what is a necessary has frequently perplexed the courts. Under practically all the authorities, these things are necessary which include shelter, food, clothing, and medical attendance, together with an education. As to what kind of food, clothing, shelter, etc., is necessary, has usually been left to a jury to decide, taking into consideration the minor's position in life, station in society, and the fortune of the child or its parents.

As to the amount of education that should be considered necessary, courts have never laid down a hard and fast rule. The rule is stated in 14 R. C. L. p. 258, as follows:

"Some kind of education has been included from early times within the class of necessaries for which an infant may contract. The early cases, however, seem to have confined this to elementary or vocational education, and even in the latter cases a college, university or professional education has generally been excluded, though it has been judicially suggested that it might be allowed in a case where the infant's ability and prospects justify it."

Probably the earliest reported case in this country involving the question as to whether a college education is a necessity is Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537, where a suit was brought to recover from the father tuition and other bills which represented a charge for his minor son as a student at the college. This case appears to be authority and is referred to by nearly all text-writers upon the question. The court there refused to hold that a college education was a necessary, but the court's reasoning for its holding is very interesting:

"The practical meaning of the term [necessaries] has always been in some measure relative, having reference as well to what may be called

[10] A large part of the statement of facts is omitted. The evidence showed that the daughter, Carmelita, made an unusually good record in the high school, and could become a teacher of English if she could secure the proper college training. The father's average earnings for the last three years of his life had been about $3,000 per year, he owned his own home, and had about $10,000 worth of interest-bearing securities.

the conventional necessities of others in the same walks of life with the infant as to his own pecuniary condition and other circumstances. Hence a good, common school education, at the least, is now fully recognized as one of the necessaries for an infant. Without it he would lack an acquisition which would be common among his associates; he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is, moreover, essential to the intelligent discharge of civil, political, and religious duties.

"But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. I would not be understood as making any allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study, for such was the course upon which the defendant professedly entered. Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in community."

It will be noted that this decision was in 1844. This appears to be the only reported case where the court has held that a college education is not a necessary, although in Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574, it was held that the incapacity imposed upon an infant extended to expenses incurred in acquiring a professional education, and especially as to money loaned for that purpose. It was also held in Streitwolf v. Streitwolf, 43 A. 904, 58 N. J. Eq. 570, 45 L. R. A. 842, where a boy 19 years of age desired to become a lawyer, that the father could not be required to pay such expenses. However, the decision in that case was based primarily upon the fact that the father and mother had not yet been divorced, but that suit was pending, and the court concluded that at such a stage of the case the order of the trial court was unwarranted.

There have arisen a great many cases involving the question of vocational training. Most of these cases have to do with courses in typewriting, stenography, or mechanical courses. It has been almost universally held that the question should be left to a jury to determine whether the commercial or vocational course was a necessary under all the circumstances shown by the evidence, including the situation of the minor and his parents.

MAD.D.R.

The decision in Cory v. Cook, 53 A. 315, 24 R. I. 421, involving the right to recover the cost of a commercial education in bookkeeping is interesting upon the point of what education is necessary. The court quoted approvingly from Breed v. Judd, 1 Gray (Mass.) 455:

"It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessaries. It is a flexible, and not an absolute, term, having relation to the infant's condition in life, to the habits and pursuits of the place in which and the people among whom he lives, and to the changes in those habits and pursuits occurring in the progress of society."

The court then said:

"It is clear from the foregoing statements of the law * * * that the word 'necessaries' is a relative term, and is not limited to those things which are indispensable to the infant's personal support and comfort. Whether a college or a strictly professional education could be classed with necessaries under any circumstances, we are not called upon to decide. But that such an education and training as will fit one for the ordinary duties of life in the sphere in which he moves, and enable him to earn a respectable and honest living in his chosen vocation, should be so classed, we have no doubt."

The purpose of the education of minors is very well stated by Schouler in his work on Domestic Relations, at page 774:

"The second duty of the parent is that of education; a duty which Blackstone pronounces to be far the greatest of all in importance. This importance is enhanced by the consideration that the usefulness of each new member of the human family to society depends chiefly upon his character, as developed by the training he receives in early life. Not the increase of population, but the increase of well-ordered, intelligent, and honorable population is to determine the strength of the state; and, as a civil writer observes, the parent who suffers his child to grow up like a mere beast, to lead a life useless to others and shameful to himself, has conferred a very questionable benefit upon bringing him into the world, and the education should be consistent with the station in life of the parties. Solon excused the children of Athens from maintaining their parents if they had neglected to train them up in some art or profession. So intimately is government concerned in the results of early training, that it interferes, and justly, too, both to aid the parent in giving his child a good education, and in compelling that education, where the parent himself, and not the child, is delinquent in improving the opportunities afforded."

Applying the rule as stated by the courts and the text-writers, it will be seen that the question of what sort of an education is necessary, being a relative one, the court should determine this in a proper case from all the facts and circumstances. Nor should the court be restricted to the station of the minor in society, but should, in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of to-day. The rule in Middlebury Col-

lege v. Chandler, supra, was clearly based upon conditions which existed at that time. An opportunity at that early date for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within the reach of the most affluent citizens. While there is no reported case, it is hardly to be doubted that the courts at that time would have even held that a high school education was not necessary, inasmuch as very few were able to avail themselves of it. But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, to-day such a person may almost be said to be the rule. The law in an attempt to keep up with the progress of society has gradually placed minimum standards for attendance upon public schools, and even provides punishment for those parents who fail to see that their children receive at least such minimum education. That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.

It seems to be contended that the minor in this case should be content with a commercial education, and it is argued that, since she is a graduate of the Lincoln high school, that fact demonstrates that she is able to earn her own living, and should no longer be a charge upon her father. But the record discloses that she has no aptitude for commercial work. It also appears that she completed her high school course in a little more than one-half the time usually taken, because of her genius for that class of work. It would seem, then, that she is not only unfitted for commercial life, but that she is exceptionally well-fitted for her chosen vocation.

If required, the necessity for this education can be grounded upon the authority of those cases involving vocational education. While there are many ways other than a college course to fit one for most of the vocations, there is no other suitable way to fit the minor for teaching English in the modern high school. But we think the court's order should be sustained upon the broader ground indicated herein.

Appellant's counsel strenuously argued that it is the father's right to determine what education he will give his children, and that if he decides not to give them a college education, and to save his money for other purposes, the courts should not interfere. This rule is a salutary one, and should always be applied to a proper case. Whenever a father has the custody of a child, the law presumes that he will provide for the child education in that vocation for which it is best fitted, and which will enable it to meet the conditions of modern life. But can the courts

indulge that presumption where the custody of the child has been taken from the father? It seems to us that the mother, while she has the custody of the child, being in daily contact with her, and knowing her talents and abilities, should be the one to determine what education she should have. Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do. This is demonstrated in this case where the decedent refused to say upon the witness stand whether he would send Carmelita to college if she were living under his roof. In most cases the father, who is the one who holds the purse strings, and whose earning capacity is greater than that of the mother, is the one who is able to give the minor a proper education. To adopt the rule contended for by appellant would be to put the court, in providing for the custody of the child, in the dilemma of knowing that if the child is given to the mother the father would, in very many cases, refuse to give it an education greater than that required under the penalty of the law, and that the mother could not do so. The court would then be under the necessity of giving the child to the mother, who appeared to be the proper person to care for it, and leave the child without hope of an adequate education, or, to the father, who perhaps was an improper person, with the hope that it will receive its just opportunities.

Our conclusion is that, since the mother has the custody of this child, knows its character and ability, she is in position to determine what education it should have, what course should be pursued, and, this having received the approval of the court, we think it follows that the court's ruling should be upheld.

One other minor point remains to be considered. Many of the cases hold that a father will not be required to pay the expenses of keeping the child in a private or boarding school when the public institutions of the state are, in his opinion, as good, and where the expense of maintaining such child in such institutions will be less than in a private school. That point is really not involved in this case, for the reason that no contention is made that the minor could attend any of the state institutions at less expense than she could attend the College of Puget Sound while living in the home of her mother.

The amount allowed, $60 per month, seems reasonable under all the circumstances. The minor child cannot attend college unless that amount is provided, and we think the financial situation of decedent demonstrated that the payments could be met without difficulty.

There being no reversible error in the record, the judgment is affirmed.[11]

11 See note, 47 A. L. R. 118, on the subject of decrees against parents for the education of children. In Rice v. Andrews, 127 Misc. Rep. 826, 217 N. Y. S. 528 (1926), a father, to whom the custody of his child had been given at his request, in divorce proceedings, died soon thereafter, and by his will disinherited the child. It was held that the court could make no decree against the father's estate for the support of the child. See, also, Blades v. Szatai, 151 Md. 644, 135 A. 841, 50 A. L. R. 232 (1927).

TOLMAN, C. J., and HOLCOMB, MAIN, and MACKINTOSH, JJ., concur.

PARKER, J. (dissenting). I dissent from the view that a father is under legal obligation to furnish means for this child to acquire more than a high school education, situated as this father was prior to his decease; though I am ready to somewhat reluctantly yield to the amount of the award viewing the needs of the child apart from her claimed educational necessities.

HUKE v. HUKE.

St. Louis Court of Appeals of Missouri, 1891. 44 Mo. App. 308.

THOMPSON, J. This action is brought by a daughter, seventeen years of age, by her next friend, against her father for support and maintenance. The circuit court sustained a demurrer to the petition, and the plaintiff prosecutes this appeal. The petition is as follows:

"Your petitioner, Frieda Huke, by Thomas P. Bashaw, her next friend herein appointed, respectfully represents and shows: That petitioner is a resident of the city of St. Louis, state of Missouri, aged seventeen years, and the daughter of defendant, William Huke, by Amelia Huke, his wife, who died in said city of St. Louis on the thirteenth day of November, 1888; that continuously from her birth, until the date hereinafter mentioned, petitioner resided with and remained under the guardianship and control of her father, said William Huke, and dependent upon him for her support, for necessaries and for mental and moral training and education; that, on or about the first day of July, 1890, petitioner's father, said William Huke, forcibly by commands, threats and duress, compelled petitioner to depart from and to leave his house and home without money or means or provision for her subsistence, and has continuously since failed, neglected and refused to resume exercise or perform any of his duties as her parent and natural and legal guardian, and has utterly and wholly renounced and abandoned all his said duties, and has failed, neglected and refused to make provision, or to supply any money or means, for petitioner's care, custody and guardianship, for her support, for her necessaries, or for her mental and moral training and education; that for many years last past defendant, William Huke, has been, and still is, the owner of a large amount of property, and engaged in prosecuting an extensive and profitable business in said city of St. Louis, and possessed of a large income, and is well able financially to make provision for petitioner's needs in the premises; that petitioner is wholly destitute, has no funds, property or resources of any kind; that, by reason of her youth, sex and lack of education and experience, she has been and is unable to secure employment or to earn the means

of subsistence; that she is without a home, and that she has no abiding place, food or raiment, save such as are bestowed upon her in friendship and charity; that she is without means or provision, or hope of obtaining same, for the furtherance of her mental and moral training and education; that, for her relief, she has incurred debts and obligations beyond her capacity to pay, and her credit is now exhausted; that the petitioner is wholly without hope or prospect of relief, and without remedy at law, or any remedy whatsoever, save through the intervention of this honorable court in enforcing against her father, said William Huke, petitioner's right to a just, adequate and suitable provision for her wants in the premises. Wherefore, petitioner, by Thomas P. Bashaw, her next friend aforesaid, prays this honorable court to grant herein its order and command to said William Huke, requiring and directing him to appear before this court at a time in said order to be stated, then and there to show cause, if any there be, why he should not be ordered, directed and required by this honorable court to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority, and for her necessary cost and expenses herein, and further to show cause, why this honorable court should not appoint in that behalf a suitable person to act under the orders and direction of the court as petitioner's acting guardian in the premises; and petitioner further prays the court, through Thomas P. Bashaw, her next friend aforesaid, that upon the return to said order, and upon the final hearing hereof, this honorable court may by order and decree herein order, direct and require said William Huke to furnish and pay over, pendente lite, and from time to time, the necessary funds and means for the supplying of petitioner's wants in the premises during the remainder of her minority for her support, for necessaries, mental and moral training and education, for her costs and expenses herein, and that this honorable court may, for the accomplishment of such purposes, nominate and appoint a suitable person to act pendente lite, and until petitioner attains her majority, under the orders and direction of this honorable court, in receiving such funds and means from said William Huke, and applying same for the purposes aforesaid for the benefit of petitioner, and for such other and further relief as may seem meet and proper and within the powers of this honorable court."

This action proceeds in the face of elementary principles. By the common law of England a father is not bound to support his infant child in the sense that the obligation has any legal sanction; no action can be maintained against him, without the aid of statute, to compel him to discharge this natural duty. By that law a father is not liable, as upon an implied contract, to a stranger who furnishes necessaries for the support of his infant child. Urmston v. Newcomen, 4 Ad. & El. 899; Mortimore v. Wright, 6 Mees. & W. 482; Seaborne v. Maddy, 9 Car. & P. 497; Hodges v. Hodges, Peake, Ad. Cas. 79. On

this point many of the American courts follow the English rule, but some of them have departed from it and adopted the more humane principle, that the moral obligation of the father to support his infant child is sufficient to raise an implied promise to pay for necessaries furnished to a child by a stranger. See, for instance, Gotts v. Clark, 78 Ill. 229; Hunt v. Thompson, 3 Scam. (Ill.) 179, 36 Am. Dec. 588. I have looked through our Missouri cases without satisfying myself what the state of our law is on this question of the father's liability for necessaries. But the intimations of those cases are such that we may concede that, under our law, a father is liable to a stranger for necessaries furnished to his infant child. Rogers v. Turner, 59 Mo. 116; St. Ferdinand Academy v. Bobb, 52 Mo. 357; Girls' Home v. Fritchey, 10 Mo. App. 344. And yet it does not follow that such an action as the present will lie.

No instance is found in the books, where such an action as the present has been maintained, either at law or in equity. At one period in our English history a statute was enacted that, if any popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of the court, constrain him to do what is just and reasonable. Stat. 11 & 12 Wm. III, c. 4. The very enactment of this statute,—the necessity in the state of the law for such a statute,—shows that a father was under no compulsory obligation at common law, or by the principles of equity, to support his infant child. A case arose after the passing of this statute, making this conclusion still more clear. The daughter of a wealthy Jew had embraced Christianity, and he turned her out of doors. On the petition of the parish for relief against him, they were held entitled to none, because it was not alleged that she was poor or likely to become chargeable. Inhabitants of St. Andrews Parish v. Mendzes de Breta, 1 Ld. Raym. 699. This gave occasion for another statute, which ordained that, if Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the lord chancellor, on complaint, might make such order as he should see proper. Stat. 1 Anne, c. 30; 1 Bla. Com. 449.

But it is suggested, in argument, that this petition is addressed to the chancery powers of the circuit court, and that the chancellor of England had, in virtue of a delegated authority from the king as parens patriæ, or, as was sometimes said, the father of the fatherless, a power to require a father, having the means, to set apart a fund for the support of his indigent minor child. That court has again and again asserted a species of vice-regal power over the custody and education of children, in virtue of a delegated authority from the king as parens patriæ. But the extent to which the court has gone in the exercise of this power has been to make orders disposing of the custody of infant children, and directing a scheme of education out of

their own property, when they had property out of which such a scheme could be directed. At one time there was considerable opinion to the effect, that the jurisdiction of chancery in this regard rested upon property; and, therefore, it was a common practice for some relative of a child, desiring to obtain an order of chancery, taking the child away from the father for misconduct of the latter, to settle upon the child a certain amount of property. But it was finally settled that the jurisdiction did not rest on property (In re Spence, 2 Phil. 247; In re Fynn, 2 De Gex & Sm. 457, 481); though the chancellors often refused to exercise it in cases where the infant had no property, because, without the aid of property, it could not be conveniently and beneficially exercised. In re Fynn, supra.

In the exercise of that jurisdiction it will appear that the English court of chancery went so far as to level orders and decrees against parents and guardians residing in foreign countries—in France and America, and that it stood ready to enforce those decrees by imprisoning the defendants in the Fleet, whenever they should set their feet upon the soil in England—a jurisdiction which, it may be assumed, no American court would dare to exercise. But, while thus attempting a tyrannical and extra-territorial jurisdiction against parents, no court of chancery in England ever made an order requiring a father, however wealthy, to set apart out of his own estate a fund for the maintenance and education of his infant child, or even to provide sustenance for such child. The common law of England has, from the earliest times, left this duty to the natural feelings of the parents, and experience has shown that the confidence has not in general been misplaced. If distressing circumstances to the contrary sometimes arise, the most that can be said is that they illustrate a profound defect in the common law. The court cannot remedy this defect, for the courts have no legislative power. Arguments, addressed to us upon the reason and humanity of the rule which would sustain this action, are vain. They are addressed to a tribunal which has no jurisdiction to change the law of the land.

We have been referred to the case of Cowls v. Cowls, 8 Ill. 435, 44 Am. Dec. 708, in which the court sustained an action by a divorced wife against her husband for the maintenance of the children of the marriage. Without reference to the ground on which the relief was put, it is sufficient to say that it is no authority for the present action. The action was brought by a wife, who had been divorced against her late husband, and it may be assumed that the court still possessed jurisdiction over the subject of alimony and maintenance. But, whatever may be said of the ground on which that case proceeded, we are obliged to say that a single decision cannot change a rule of the common law which has been settled for ages.

The view which we take of this petition renders it unnecessary to consider whether, in view of the jurisdiction over the guardianship of minors, which our statutes have vested in the courts of probate,

such a jurisdiction as is here invoked could be held to exist in the circuit courts in any event.

The judgment will be affirmed. All the judges concur.[12]

DOUGHTY v. ENGLER.

Supreme Court of Kansas, 1923. 112 Kan. 583, 211 P. 619, 30 A. L. R. 1065.

Action by Rodney Doughty, a minor, by Edyth M. Woods, his next friend, against Ray Engler. From an order sustaining a demurrer to the petition, plaintiff appeals. Reversed and remanded, with directions.

MASON, J. A four year old boy, born out of wedlock, brought this action through his mother as his next friend, against one alleged to be his father, to require the defendant to make provision for his support. This appeal is taken from the sustaining of a demurrer to the petition.

At common law the father of an illegitimate child was under no legal duty to support it. In behalf of the plaintiff it is urged that this rule is not sound in reason and not in keeping with modern ideas of natural right, and should not be regarded as remaining in force in aid of our statutes by virtue of the act giving that effect to the common law as modified by "the conditions and wants of the people." Gen. Stat. 1915, § 11829. The courts of this country apparently in every case in which the question has been raised have held that without legislation on the subject the father of an illegitimate child cannot be required to provide for its support. 7 C. J. 955. In most of these cases, however, the matter has been treated as settled by the mere fact that the common law recognized no such duty on his part, and the question whether the rule is so repugnant to present-day conceptions of social obligations that courts should refuse to follow it has not been extensively discussed.

The common law with almost uniform consistency treated an offspring of parents not married to each other as nullius filius—the son of no one—of no father and no mother. That is to say, it closed its eyes to the fact of that relation and in legal aspect ignored its existence. It absolved the mother equally with the father from liability for the support of the child (Rutlinger v. Temple, 4 B. & S. 491), although this has been doubted (Humphreys v. Polak, 1901, 2 Q. B. D. 385, 389). It also denied to both parents the legal right to its custody. The question asked in an earlier case, "How does the mother of an illegit-

[12] Accord: Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146, 7 A. L. R. 1259 (1919), which also contains a spirited dissent.

But a court may, upon the application of a mother, who is not herself entitled to support from her husband, decree that the husband furnish maintenance for their child. Kelley v. Kelley, 317 Ill. 104, 147 N. E. 659 (1925), semble; Hayden v. Hayden, 215 Ky. 299, 284 S. W. 1073 (1926); Melson v. Melson, 151 Md. 196, 134 A. 136 (1926).

imate child differ from a stranger?" has been interpreted as "stating bluntly this legal doctrine." Barnado v. McHugh, Appeal Cases, 1891. In equity, however, recognition was made of "a sort of blood relationship" (Reg. v. Nash, 10 Q. B. D. 454) that entitled the parents to some consideration in the matter. But the common law in failing to require the parent of an illegitimate child to support it did not rest wholly upon the nullius filius idea, for as interpreted in England and in some of the American states it imposed no legal obligation in that respect even upon the parents of legitimate children. 20 R. C. L. 622; Tiffany's Persons and Domestic Relations, § 116. By the great weight of judicial opinion in this country parents are under a legal duty, regardless of any statute, to maintain their legitimate minor children (20 R. C. L. 622), the obligation being sometimes spoken of as one under the common law and sometimes as a matter of natural right and justice, and often accepted as a matter of course without the assignment of any reason. Chancellor Kent says:

"The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law." Kent's Comm. *189.

Blackstone begins his discussion of the duties of parents to legitimate children thus:

"The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from the parents." 1 Blackstone's Commentaries, 447.

The full language of Puffendorf, from which Blackstone made the foregoing condensation, is as follows:

"As to that maintenance, which parents owe their children, it hath been doubted by authors, whether the obligation to pay it were perfect or imperfect, or whether it belonged to expletive or to attributive justice. 'Tis the opinion of some, that parents do indeed owe their children maintenance, but then 'tis by the latter kind of justice only, and not by the former; so that parents would act very inhumanly, should they deny them this assistance; yet children have no right to challenge it from them against their wills, this being the proper effect of expletive justice; though civil statutes may invest children with a full and perfect right in this matter. But we are rather inclined to think that parents lie under a perfect obligation to maintain their children, so long as they are unable to maintain themselves; and this duty seems to be laid upon

them, not only by nature itself, but by their own proper act, in bringing them into the world. For they would be in the highest manner injurious to their issue, should they have given the children life, for no other reason, but that they might afterwards see them perish. By the act of generation therefore they seem to have voluntarily bound themselves to endeavor as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents. Yet this right is hindered from producing all its effects by the natural weakness of children under that age, in which they cannot provide for their own support. And consequently they do not so much want right as power and strength to execute that right; only in some points the civil ordinances help them out, and compel their parents to keep and feed them, upon refusal." Puffendorf's Law of Nature and Nations, Book 4, c. 11, § 4.

To this Puffendorf added these words:

"Farther, maintenance is due not to legitimate children alone; but to natural and even to incestuous issue. For what reason is there that the poor innocent infant should be suffered to famish for another's sin?" Section 6.

A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as a part of their responsibility for having brought it into being. If that reason is not found convincing it would be useless to seek others; and it does not in the least depend for its force upon the fact that the parents were married to each other, but is equally persuasive where that is not the case. It was true when Puffendorf elaborated it and applied it to illegitimate children in 1672, and it is true now.

The courts of some states, in the absence of a statute on the subject, hold the mother of an illegitimate child liable for its support, usually upon the ground that such liability is an incident to her right of custody (7 C. J. 956), which is sometimes assumed to exist at common law—a sort of inversion of the process by which a statutory duty of support has been said to carry with it the right of custody (Humphreys v. Polak, 1901, 2 Q. B. D. 385, 389). This court does not regard the duty of support as dependent upon the right to custody. Riggs v. Riggs, 91 Kan. 593, 603, 138 P. 628, Ann. Cas. 1915D, 809.

In a commissioner's opinion in a statutory action to charge the father of an illegitimate child with its support it was said:

"Under the law, the mother of an illegitimate child is all the while known, and is at all times, at least during its infancy, liable for its support, while the father of such child is unknown until ascertained by judicial proceedings, unless he acknowledge its paternity; and therefore, he is liable only when the paternity of the child is acknowledged by him, or it is established by judicial inquiry." State ex rel. v. Reed, 46 Kan. 501, 26 P. 956.

This was sufficiently accurate for the purposes of the case, the paternity of the child being the matter to be determined. No attempt was there made to state the ground of the mother's liability. As already indicated, we place it upon the fact of parentage and upon that basis it must extend to the father as well. The circumstance of the father's being unknown could not relieve him from the nonstatutory inherent obligation if it exists at all, although the difficulty of ascertaining the paternity might as a matter of policy influence legislation on the subject.

We do not think the Legislature should be regarded as intending to relieve the father from this obligation to the child by the enactment of the statute above referred to, which authorizes the mother of an illegitimate child, if she sees fit, to maintain an action for her benefit in the name of the state against the putative father, and provides for the enforcement of a judgment by imprisonment. Gen. Stat. 1915, c. 50. It would obviously be inadequate to cover the entire field of paternal liability, since the mother might not care to institute such a proceeding, or might die without instituting it. The measure is one providing machinery for the enforcement of a duty already existing rather than one creating a new obligation. Parental liability for the support of legitimate children did not originate with the statute of 1911 (Gen. Stat. 1915, §§ 3410–3416) imposing punishment for a default in that respect. Wagering contracts valid at common law are held nonenforceable even where they do not fall within the prohibition of statutes condemning gambling. Cleveland v. Wolff, 7 Kan. 184; 12 R. C. L. 747, 748. A rule of the common law may be unadapted to the conditions and unsuitable to the needs of the people of this state, although the change that has taken place is rather in the manner of looking at things—in the standards of obligation and conduct—rather than in more objective matters. Instances in which this court has refused to follow a rule of the common law for reasons based in a greater or less degree upon its essential unsoundness are collected in Cooper v. Seaverns, 81 Kan. 267, 105 P. 509, 25 L. R. A. (N. S.) 517, 135 Am. St. Rep. 359, where the grounds of such departure are fully discussed.

The right of a child of tender years to look to its father for support being determined, the matter of procedure presents no great difficulty. See Craig v. Shea, 102 Neb. 575, 168 N. W. 135, and Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489. A court of equity in its historical capacity as guardian of infants can readily devise means for its enforcement.

The judgment is reversed, and the cause is remanded, with directions to overrule the demurrer to the petition.

All the Justices concurring.[13]

13 See, also, Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901).

In Brill v. Brill, 282 Pa. 276, 127 A. 840 (1925), it was held that an illegitimate child could sue as a third party beneficiary, upon an agreement made between his parents for his support.

A parent cannot charge his children or their property for their maintenance. Ferrell v. Ferrell, 103 W. Va. 704, 138 S. E. 399 (1927). But he may, if they

have estates of their own, and if his income is insufficient to maintain and educate them properly, secure the permission of the court having charge of the guardianship of their property, to expend a part of their income for maintenance. Jervoise v. Silk, Cooper's Ch. Cases (tempore Eldon) 52 (1813).

Quite generally there are statutes imposing a duty to support certain destitute near relatives. A child is under no duty to support his parents, except as such duty is imposed by statute. Edwards and Wife v. Davis, 16 Johns. (N. Y.) 281 (1819). But see a note in 15 Col. L. Rev. 281, to the effect that English Courts of Chancery sometimes allowed maintenance to a parent from the estate of a child. See, also, In re Connolly's Estate, 88 Misc. Rep. 405, 150 N. Y. S. 559 (1914).

The effect of emancipation upon a parent's duty to support is considered hereinafter, Chapter 3, p. 103ff.

CHAPTER 3

PARENT'S RIGHT TO EARNINGS AND SERVICES OF CHILD—EMANCIPATION

OSBORN v. ALLEN.

Supreme Court of New Jersey, 1857. 26 N. J. Law, 388.

THE CHIEF JUSTICE [Honorable HENRY W. GREEN]. This action was commenced in the court for the trial of small causes, by Rebecca Cottrell, against Osborn, the plaintiff in error, to recover compensation for the work and labor of her son, an infant, done and performed for the defendant below, and at his request. On the trial of the appeal before the Middlesex Pleas, a motion made to non-suit the plaintiff was denied by the court. The judgment of the Common Pleas, having been removed by certiorari to the Middlesex Circuit, was there affirmed. A reversal is now asked, on the ground that the Court of Common Pleas erred in refusing to non-suit. * * *

The second reason assigned for error is, that an action cannot be maintained by a mother, the father being dead, for the services of a minor child. It appeared in evidence that the minor was a member of his mother's family; that for ten years the mother had had the sole charge of the family; that the minor worked out from home, his mother receiving his wages, and that his washing and mending were done at home.

What authority, by the laws of this state, has a mother over her minor children? The right is not regulated by statute. It rests upon the principles of the common law, as modified and moulded by our institutions and construed and applied by our judicial tribunals. Blackstone, in a parenthesis consisting of a single line, has disposed of the subject, by stating that a mother, as such, is entitled to no power, but only to reverence and respect. 1 Bla. Com. 453. And this doctrine seems to have been adopted and applied in its fullest extent by some of the American courts. Commonwealth v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412.

A dissent from so high an authority certainly should not be ventured upon without the support of clear principle. But I think it will be found that the proposition is not consistent with the principles of natural law, with the rules of the common law, or with the dictates of sound public policy.

The authority and rights of parents over their children result from their duties. The law of nature acknowledges no other foundation of a parent's right over his children besides his duty toward them. Pa-

ley's Mor. Phil., book 3, ch. 10. The authority is given them partly to enable the parent to perform his duty, partly as a recompense for his care and trouble in the faithful discharge of it. 1 Bla. Com. 452.

The duties of parents to their children, by the law of nature, rest equally upon both. It is the duty alike of each parent to maintain, protect and educate their children. Puffendorf's Laws of N., book 4, ch. 11; Paley's Mor. Phil., book 3, ch. 9; 1 Bla. Com. 446.

If, then, the rights of parents result from their duties, their duties being the same, their rights must be the same also. While the father is living, the authority of the mother, for obvious reasons, is in abeyance. As the mother herself (says Dr. Paley) owes obedience to the father, her authority must submit to his. In a competition, therefore, of commands, the father is to be obeyed. In case of the death of either, the authority, as well as duty of both parents, devolves upon the survivor. Mor. Phil., book 3, ch. 10.

The extent of this natural authority of parents over children is the subject of municipal regulation, and has greatly varied in different ages and under different systems of laws. It has undoubtedly been greatly modified by the progress of intelligence and refinement, by the diffusion of the benign principles of Christianity, and the consequent elevation of the female sex. The ancient Roman laws gave to the father the power of life and death over his children. 1 Bla. Com. 452. The mother had no authority over her children. She could have none, because the Roman laws subjected women, except they were under the cover and authority of a husband, to a perpetual guardianship. Montesquieu's Sp. of Laws, book 7, ch. 12.

The great natural duties of parents to their children, maintenance, protection and education, are all recognized at common law, and to some extent enforced by statute. The duties of protection and education are left by our law to rest simply where the law of nature has placed them. It recognizes the duty as belonging to both parents, and the consequent rights and obligations resulting from them are the same. A mother, as well as the father, may maintain and uphold her children in their lawsuits without being guilty of the legal crime of maintaining quarrels. She may justify an assault and battery in defense of the persons of her children. She may maintain an action for the seduction of her daughter. Coon v. Moffitt, 3 N. J. Law, 583, 4 Am. Dec. 392.

And in the absence of express authority, I think I hazard nothing in saying that by the well-settled law of this state, a mother is not only authorized, but bound, the father being dead, to exercise authority over her children. Upon an indictment against her for keeping a disorderly house, it would be no answer for her to say that her daughters were licentious, and her sons profligate, and that she could not govern them. The law imposes upon her the duty of restraining and governing her children; and to this end it confers upon her the requisite authority. She, as well as the father, may inflict

upon her children moderate chastisement. If not, she is indictable for punishing a minor child, however moderate that punishment may be. Such an indictment, it is believed, has never been sustained in this state. In these respects there is no distinction in our law between the authority of the mother and that of the father. It is true that the mother, as such, has during the life of the father no authority. The authority is by the law vested in the father alone; for if they shared the authority there might be conflicting powers. When the mother exercises family discipline, living the father, the law presumes it to be done by his direction and with his consent. Reeve's Dom. Rel., ch. 11. But the father being dead, the right and the duty of government, and the requisite authority for that purpose, devolve upon the mother. Such, we have seen, is the clear principle of natural law, and such we apprehend to be the law of this state: a rule founded not only upon natural law, but resting upon the dictates of public policy, and the true interest of society.

In regard to the maintenance of children, the only obligation expressly imposed by law, that of maintaining poor children not able to work, rests alike upon both parents. Nix. Dig. 614, § 26; 1 Bla. Com. 448.

There is, however, this distinction recognized by the authorities between the obligation of the father and that of the mother to maintain their infant children, viz., that the father is bound to maintain his children during their minority, though the children have ample property for their support, while no such obligation rests upon the mother. And this distinction has been relied on as showing that the mother cannot be entitled to the services of her children. But a satisfactory solution of the distinction may, perhaps, be found in the respective rights of husband and wife in regard to property, and in the distribution of the estate, upon the death of the father, under the rules of the common law.

The control of the mother over the person and services of her infant children is more restricted than that of the father. It cannot be exercised during the life of the father. Her right may be determined by her marriage, or by the appointment of a guardian for his children, either by the will of the father or by authority of law. But, by the law of this state, while she remains unmarried, the mother has a right to the services of a minor child for whom no guardian has been appointed, so long, at least, as the child remains under her protection. Within these limits, the right of the mother to the services of her children is the same as that enjoyed by the father. Such has long been understood to be the well-settled law of this state. It is supported by principle, and sound public policy requires that it should not be disturbed.

The judgment must be affirmed.[1]

[1] Accord, as to mother's right to services of minor child where father is dead or has deserted: Winslow v. State, 92 Ala. 78, 9 So. 728 (1890); Matthew-

ARMSTRONG v. McDONALD.

Supreme Court of New York, 1851. 10 Barb. 300.

By the Court, CADY, J. Duncan McDonald, an infant, came from Canada and hired himself to the defendant as a laborer. He commenced working for the defendant in June, 1848, and between that time and May, 1849, he worked for the defendant between seven and eight months. During that time he received from the defendant money, clothing, etc., to the amount of about $52. At his request, John McDonald, the plaintiff, a resident in Canada, and who claimed to be the father of Duncan, commenced this action to recover the value of the labor performed by Duncan. The defendant, in his answer, denied that he was indebted to the plaintiff. He denied that the plaintiff was the father of Duncan, and entitled to his services. He alleged that he had paid Duncan the full value of his services, and that the plaintiff allowed the said Duncan to contract for himself, and receive pay for his labor. * * *

Again, according to the testimony of Duncan McDonald, he left the service of the plaintiff in March, 1848. He worked where he pleased for two months in Canada, and in May, 1848, left Canada, and came into the county of St. Lawrence. He worked for various persons till the 8th of June, 1848, and commenced work for the defendant, and worked for him before May, 1849, seven and one-half months. He went home during that period two or three times. The plaintiff at no time gave the defendant notice that he should claim pay for the work of Duncan McDonald, nor had he, down to the time of trial, set up any claim to be paid for the work performed by Duncan McDonald for any person other than the defendant, in the county of St. Lawrence. He was informed that Duncan McDonald was coming into this state. He did not consent to it, but he made no effort to induce him to return into Canada; nor did he give any notice to any one not to employ or pay Duncan for his labor, but applied to Duncan for money, and promised

son v. Perry, 37 Conn. 435, 9 Am. Rep. 339 (1870); Briscoe v. Price, 275 Ill. 63, 113 N. E. 881 (1916); Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504 (1893); Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288 (1872); Simpson v. Buck, 5 Lans. (N. Y.) 337 (1871).

Contra: Pray v. Gorham, 31 Me. 240 (1850); Franz v. Riehl, 5 Pa. Dist. R. 565 (1896). See, also, the dissenting opinion of Hogeboom, J., in Gray v. Durland, 50 Barb. (N. Y.) 100, 218 (1867).

If the father is dead, the mother, if she has the custody of her children, is under a duty to support them. Fulton v. Fulton, 52 Ohio St. 229, 39 N. E. 729, 29 L. R. A. 678, 49 Am. St. Rep. 720 (1875).

The father's right to his child's services may be assigned. Roby v. Lyndall, Fed. Cas. No. 11,972 (1833); McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 A. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (1902). But an apprenticeship which will impose upon the child the duties of an apprentice cannot be created except by strict compliance with the statute. State v. Barrett, 45 N. H. 15 (1863).

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him a horse if he would let him have money; thus treating him as a person who had a right to act for himself.

In the case of Whiting v. Earle and Trustee, 3 Pick. 202, 15 Am. Dec. 207, it was said by the court, "We go so far as to say that, when a minor son makes a contract for his services on his own account, and the father knows of it, and makes no objection, there is an implied assent that the son shall have his earnings." The plaintiff knew that Duncan McDonald had left Canada, and was in this state. He made no effort to make him return, and gave notice to no one that he should claim pay for Duncan's labor. It appears that this action was commenced at the request of Duncan, and evidently for no purpose but to defraud the defendant out of the payments made by him to Duncan I am of opinion that the justice erred, in deciding that no part of the defendant's account could legally be allowed, except for actual necessaries; and, upon that ground, also, the judgment of the justice, and of the County Court, ought to be reversed.[2]

Judgment reversed.

McCLOSKEY v. CYPHERT.

Supreme Court of Pennsylvania, 1856. 27 Pa. 220.[3]

The opinion of the court was delivered by

BLACK, J. Solomon Cyphert was an insolvent man with a large family. The farm on which he lived, and all his personal property not exempt from execution, had been sold by the sheriff. His eldest son, then seventeen years of age, took a lease of the farm from the sheriff's vendee, and was enabled to stock it after a fashion by the generosity of certain relatives and friends who gave and lent him implements of husbandry, horses, cattle, hogs, and sheep. He raised several crops, increased the value of the stock, supported his father's family, and had a crop in the ground when the defendants seized everything for an old debt of his father. Had they a legal right to do this?

If the father had saved anything out of his own wreck beyond what was legally exempt from levy and sale, and had given it to his son for the purpose of covering it up from his creditors, the transaction would have been fraudulent. The jury were in effect so instructed, but they found no fact of that sort. If the son was the mere servant and agent of his father, and his pretended ownership of the property a sham, he would have no right to complain that it was taken. But this also is negatived by the verdict. If he had ever bought it from his father, pay-

[2] See McClurg v. McKercher, 56 Hun, 305, 9 N. Y. S. 572 (1890), for an application of a statute, protecting the employer in paying wages to the child, if not notified by the parent of his claim to the wages.

[3] Statement of facts is omitted.

ing an honest price for it, his title as against creditors might be doubtful, for want of the open delivery and exclusive possession which the law requires to make such a transfer valid. But that was not alleged at the trial. All the property in dispute was given to the plaintiff by other persons in his own right, and the lease of the land appears to have been taken in good faith by himself and for himself. He got nothing from his father; for his father had nothing to give him. His whole offense, if he committed any, consisted in applying what he received from the bounty of his friends, and what he made by his own labor in such a manner as to rescue his parents and the younger members of the family from want. There was, therefore, no fair question of actual fraud in the case; or, if there was, the verdict settled it conclusively against the defendants. Nor was it possible to raise the point of legal fraud on the ground of an imperfect purchase of goods from an indebted man. The defense can be made out only by showing that the minor child of an insolvent person cannot, even with the consent of his father, acquire property by gift, or create by his labor anything which will not go to his father's creditors. But that is a proposition which we think the law will not sustain.

The right of an infant to be the owner of property is as clear and as well protected as that of a person who has arrived at full age. When anything is given to an infant to be held by him in his own right, he has the title to it, and the parent, guardian, or master has in law no more right to take it (for any purpose beyond that of safe-keeping) than a stranger.[4]

A son is bound to render obedience to his father until he is twenty-one years of age. The father may employ him about his own business without paying him wages, or hire him out and appropriate his earnings if he sees fit. But he may also let him go free from his service whenever he chooses. If he happens to be in debt, he is not bound to work his son or daughter as he would work a horse or a slave for the benefit of his creditors.

This emancipation of the son from the father's control may be as perfect when they both live together under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not the less absolute, because other family ties continue unbroken, and the son's security in his rights of property would not be at all increased by turning his father out of doors.

It is not necessary in a Christian country to say that a son ought to support his father if he has the means of doing so. The law will not punish him for performing this duty, by depriving him of any right

4 Accord: Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105 (1858). It has been held in several cases that a bounty paid to a minor for enlistment in the military service of the United States is not earnings, and therefore belongs to the minor and not to his father. Magee v. Magee, 65 Ill. 255 (1872); Banks v. Conant, 14 Allen (Mass.) 497 (1867); Holt v. Holt, 59 Me. 464 (1871); Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579 (1895).

which he would otherwise have. If, therefore, an emancipated son gives part of his earnings to his father's support, it does not follow that the father or his creditors can for that reason take away all the rest of his earnings.

That the father in this case did some work on the farm, but not as much in value as his maintenance amounted to, is obviously of no importance whatever.

It seems that this farm was twice sold by the sheriff; first to McClune, and afterwards to the Harleys. McClune had the true title, but the Harleys got the possession and leased to Peas, who sublet to the plaintiff. McClune recovered in ejectment, and might have turned the plaintiff out and taken from him the crop which he then had in the ground; but he did not do so. He expressly agreed that he might cut and keep it on certain conditions, which seem to have been performed. We are really not able to understand the argument which strives to convince us that these facts make the defendant's case any better. Judgment affirmed.[5]

HALL v. HALL.

Supreme Judicial Court of New Hampshire, 1862. 44 N. H. 293.

Assumpsit, for services rendered by Cynthia Hall, one of the plaintiffs, to her father, the defendant's intestate, in his family, from November, 1852, to March 21, 1857. The said Cynthia was of age March 4, 1857. On the 21st day of March, 1857, she married the said Isaac, and left her father's house. The defendant filed a confession of her claim from the time she became twenty-one years of age to said 21st of March, and pleaded the general issue as to the residue.

For the purposes of this case it was admitted that in January, 1852, the deceased gave the said Cynthia her time and future services, in writing, which writing was published in the Dover Gazette on the 17th day of January, and on the two following weeks; a copy of which is as follows:

"Time Given.

"This may certify that I have this day given to my daughter, Cynthia Hall, her time henceforth, and she is free to act and trade for herself. I shall not claim any of her earnings, nor pay any debts of her contracting after this date. William Hall.

"Barrington, January 14, 1852.

"Witness—John T. Gibbs."

[5] **Accord:** Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386 (1872); Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207 (1825); Marlar v. Smith, 134 Miss. 76, 98 So. 338 (1924); Shortel v. Young, 23 Neb. 408, 36 N. W. 572 (1888); Beaver v. Bare, 104 Pa. 58, 49 Am. Rep. 567 (1883), semble; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30 (1892).

Soon after that time Cynthia left her father's, and was employed elsewhere, receiving her own earnings to her own use. Previous to November, 1852, while she was at work in another town for herself, the deceased requested her to come home and work in his family, and promised her, if she would do so, he would pay her as much as she could earn elsewhere; whereupon she came home, and, with some intermissions, worked in her father's family till said 21st day of March.

Whether upon these facts the plaintiffs are entitled to recover for the services of said Cynthia, before she became twenty-one years of age, the parties agreed to submit to the determination of the court; and, if the court shall be of opinion that the plaintiffs have no right to recover for last-named services, judgment is to be rendered for the plaintiffs for the amount confessed, and for the defendant for his costs from the date of his confession. But, if the court should adjudge otherwise, then this case is to be discharged, and the action stand for trial on said issue.

BELL, C. J. A father may, by agreement with his minor child, relinquish to the child the right he has to his services and earnings, and he will afterward have no right to claim his wages from his employers, but the child may claim and recover them in his own name for his own benefit. [A number of cases were cited here.]

Such an agreement operates as a release of the father's right, and he has no power to reclaim or resume it afterward, Preston Touchstone, 307; Litt. § 467; nor will his right revive, unless, from the actual agreement of the minor, or one fairly inferable from the circumstances and conduct of the parties.

An agreement of the father with his son stands on different ground from his agreement with a third person, to give up to him the control of his child for a limited time, or during his minority. As between them, the right of the father over his child has been held a personal trust, which cannot be transferred, unless by indenture under the statute, and which it has been held the father may therefore resume at his pleasure, Regina v. Smith, 16 E. L. & E. 221; People v. Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644; Mayne v. Baldwin, 1 Halst. 454; State v. Clover, 16 N. J. Law, 419; though upon this point the decisions do not all agree, State v. Smith, 6 Greenl. (Me.) 462, 20 Am. Dec. 324; Pool v. Gott, 14 Law Rep. 269; Matter of Mitchell, R. M. Charl. 489; Commonwealth v. Gilkeson, Hurd Hab. Corp. 543.

The agreement to sell or give to a child his time, and to relinquish to him all right to his services or earnings, affords no foundation for the usual concluding portion of the published notices, in which the father declares that he will pay no debts of the child's contracting. As a notice that the father has revoked all power of the son to contract on his account, it may be valid, and any person who should contract with him, as an agent of his father, would do so at his peril, and the father generally would not be liable. But the duty imposed by law upon the father to maintain his minor child in case of his inability to maintain himself, rests on considerations of public policy, looking to the protection

of the community, and it cannot be renounced at his pleasure, nor the burden transferred to one who is not deemed in law generally competent to contract, nor capable of performing such a duty. Pidgin v. Cram, 2 N. H. 353; Hillsborough v. Deering, 4 N. H. 95; Jenness v. Emerson, 15 N. H. 488.

Under an agreement to give a son his time the father may contract to employ and pay him, or to hire him to labor for himself, and he will be equally bound as a stranger, and the son may recover his wages of him by a suit.

If, then, in the present case, the father employed his daughter, to whom he had released his right to her services, and agreed to pay her wages for her labor, he and his estate are bound by the contract, and the daughter may well maintain her action.

The case then turns upon the question whether there was an agreement between the deceased and his daughter that she should render her services, not as a daughter, but as a hired servant, and that she should be paid for her services as such, either wages at a certain rate, or a just and reasonable compensation, payable at all events; a question proper for the consideration of a jury.

Upon the statement made, we cannot decide the case without determining these questions of fact, and in doing so we have to consider certain other legal principles.

The minor who is released from his father's service stands, as to his contracts for labor, either with strangers or with him, in the same position, as to this question of fact, as he would do if he had arrived at full age. Steel v. Steel, 12 Pa. 64.

Generally, where one man performs services for another, at his request, or with his knowledge, and without objection, the law implies a contract on the part of the person receiving the benefit of the service, to pay a reasonable compensation for it, 1 Pars. Con. 530; Phillips v. Jones, A. & E. 333; James v. Bixby, 11 Mass. 34; Farmington Academy v. Allen, 14 Mass. 172, 7 Am. Dec. 201; Guild v. Guild, 15 Pick. (Mass.) 130; Lamb v. Bunce, 4 M. & S. 275; but this rule does not apply where it appears that the service was intended and understood to be gratuitous, or without expectation of payment, Newell v. Keith, 11 Vt. 214; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Griffin v. Potter, 14 Wend. (N. Y.) 214; Livingston v. Ackeston, 5 Cow. (N. Y.) 532.

Among the cases of the last description is the case of children of any age, residing with and making part of the family of their father. In such cases the presumption of law is that the services rendered on the one side, and the board and supplies furnished on the other, are gratuitous, and that payment for them is neither expected nor promised. This presumption may be met by direct proof of an express promise or agreement by the father to pay wages for the services of his son or daughter, or by the son or daughter to pay for their board, or such supplies as they receive, but loose talk is hardly regarded as evidence

of such an agreement sufficient to rebut the legal presumption. There must be proof of a bargain, negotiated and concluded on both sides, and the mere assurance that the son shall be well used, or shall not be a loser, etc., is not regarded as evidence of such a contract.

The legal presumption may still be met by proof of such circumstances, connected with their dealings with each other, as fairly warrant the inference that it was the understanding and expectation of the parties on both sides that such services and supplies were to be paid for as a debt. Fitch v. Peckham, 16 Vt. 150; Andrus v. Foster, 17 Vt. 556; Williams v. Hutchinson, 5 Barb. (N. Y.) 122; Dye v. Kerr, 15 Barb. (N. Y.) 444, and cases cited; Ridgway v. English, 22 N. J. Law, 409; Munger v. Munger, 33 N. H. 581, and cases cited; Seavey v. Seavey, 37 N. H. 133.

The case of Davis v. Goodenow, 27 Vt. 717, in its principal features bears a close resemblance to the present. The plaintiff was brought up in her grandfather's family. After she was of age and had gone abroad to work for herself, she returned, at the defendant's request, upon the assurance she should be paid as well as she was then doing. This was often repeated during the three years she remained in the defendant's service, much as before she was of age. No reckoning of wages or account on either part was ever had, or kept, nor was any claim made by the plaintiff for pay, or that anything was due her, when she left, or when she needed money to get home, or when she was married, or when the defendant distributed his property; and Redfield, J, says: "Under this state of facts the case seems to us the ordinary one of a child, or other relative, living in the family of the parent, or one occupying that place, after they become of age, with the assurance that they shall be liberally compensated, without saying in what mode, and with no definite expectation that either the service or support will create a debt; in which case it is well settled that neither can sustain an action against the other for any excess of real value of one above the other." [6]

[6] "NOTE ON VARIOUS PERMISSIBLE AND PRIMA FACIE INFERENCES OF FACT WHICH ARISE FROM THE EXISTENCE OF THE RELATION OF PARENT AND CHILD.—(1) Parent's support of child gratuitous: The parent, actually furnishing the child with necessary support and maintenance, is denied any right to charge the child for necessaries so furnished. It is immaterial whether the child is a minor and emancipated, or an adult. Terry v. Warder, 78 S. W. 154, 25 Ky. Law Rep. 1486 (1904). The same holding occurs where the child is a stepchild, or where the adult furnishing necessaries has assumed a position in loco parentis toward the child. Dixon v. Hosick, 101 Ky. 231, 41 S. W. 282 (1897); Smith v. Rogers, 24 Kan. 140, 36 Am. Rep. 254 (1880); Kempson v. Goss, 69 Ark. 451, 64 S. W. 224 (1901); Livingston v. Hammond, 162 Mass. 375, 38 N. E. 968 (1894). But see Eiken v. Eiken, 79 Minn. 360, 82 N. W. 667 (1900).

"(2) Child's support of parent prima facie gratuitous: In re Skelly's Estate, 18 Misc. Rep. 719, 43 N. Y. S. 964 (1896); Niehaus v. Cooper, 22 Ind. App. 610, 52 N. E. 761 (1899); Lawrence v. Bailey, 84 Mo. App. 107 (1900); Borum v. Bell, 132 Ala. 85, 31 So. 454 (1902); Nicholas v. Nicholas, 100 Va. 660, 42 S. E. 669 (1902), rehearing denied 42 S. E. 866 (1902); In re Prizer's Estate, 12 Montg. Co. Law Rep. (Pa.) 186 (1896); Harris v. Orr, 46 W. Va. 261, 33 S. E.

There were in that case several circumstances which doubtless had their weight in leading the court to this result, which this case does not show. Here nothing appears further than that the daughter, having a right to her time and earnings, and laboring abroad for her own benefit, was requested by her father to come home and work in his family, and he promised her, if she would do so, he would pay her as much as she could earn elsewhere, and she did come home, and worked there, as charged. This evidence, standing alone and unexplained, seems to us an express contract, by which the father was bound, and upon which the daughter is entitled to recover. This point the parties have a right to try by jury, and for that purpose

The case is discharged.

JACKIEWICZ v. UNITED ILLUMINATING CO.

Supreme Court of Errors of Connecticut, 1927. 106 Conn. 310, 138 A. 151.

Action by Polikarp Jackiewicz against the United Illuminating Company to recover for moneys expended in the cure and care of his minor son and for loss of his earnings as a result of injuries sustained through the alleged negligence of defendant. Tried to the jury with the case of Edward Jackiewicz against the same defendant. Verdict for plaintiff for $3,750, which the court, upon defendant's motion, set aside unless plaintiff should remit $2,965. The plaintiff refused to remit, the verdict was thereupon set aside, and plaintiff appeals. No error.

See, also, 138 A. 147.

WHEELER, C. J. The trial court ordered the verdict set aside conditionally on three grounds: (1) That there had been no evidence of pe-

257, 76 Am. St. Rep. 815 (1899). But see Bell v. Rice, 50 Neb. 547, 70 N. W. 25 (1897).

"(3) Inference of gift to child: So, where property is paid for by the parent, but a conveyance is taken in the name of the child, there is a prima facie inference of a gift to the child, and no trust results to the parent who pays the consideration. Euans v. Curtis, 190 Ill. 197, 60 N. E. 56 (1901); Kern v. Howell, 180 Pa. 315, 36 A. 872, 57 Am. St. Rep. 641 (1897); Rhea v. Bagley, 63 Ark. 374, 38 S. W. 1039, 36 L. R. A. 86 (1897).

"(4) Services rendered by adult or emancipated child to parent, and vice versa, are gratuitous, in the absence of an express contract between the parent and child. Munger v. Munger, 33 N. H. 581 (1856); Putnam v. Town, 34 Vt. 429 (1861); Hall v. Hall, 44 N. H. 293 (1862); Schwachtgen v. Schwachtgen, 65 Ill. App. 127 (1895); Wamsley v. Wamsley, 48 App. Div. 330, 62 N. Y. Supp. 954 (1900); Williams v. Resener, 25 Ind. App. 132, 56 N. E. 857 (1900); In re Dettenmaier's Estate, 13 Pa. Super. Ct. 170 (1900); Williams v. Halford, 73 S. C. 119, 53 S. E. 88 (1905); Avitt v. Smith, 120 N. C. 392, 27 S. E. 91 (1897); Bell v. Rice, 50 Neb. 547, 70 N. W. 25 (1897); Kloke v. Martin, 55 Neb. 554, 76 N. W. 168 (1898); McDaniel v. Parish, 4 App. D. C. 213 (1894); Jessup v. Jessup, 17 Ind. App. 177, 46 N. E. 550 (1897); Jackson's Adm'r v. Jackson, 96 Va. 165, 31 S. E. 78 (1898); Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841 (1900); Enger v. Lofland, 100 Iowa, 303, 69 N. W. 526 (1896). The same holding occurs where one party stands in loco parentis to the other. Garcia v. Candelaria, 9 N. M. 374, 54 P. 342 (1898)." Kales' Cases on Persons, pp. 110, 111.

cuniary loss to the plaintiff's parent from loss of earnings of his minor son; (2) that the instruction of the court upon this subject was inadequate; and (3) that the verdict in favor of the minor son had probably included the amount awarded the parent in this case for loss of the son's earnings during his minority, and hence was excessive.

Nothing appears in the record which enables us to know, or which enabled the trial court to know, that the jury included, in the action brought in behalf of the son, the amount due his father for loss of the son's earnings during his minority. If the jury followed the instruction of the court, they did not include such amount. Moreover the verdict in the action brought in behalf of the son was not set aside by the trial court as excessive because of the inclusion of such earnings. The setting aside of a verdict by the trial judge for error in his instruction to the jury should be exercised by him with great caution, and never done unless he is entirely satisfied, upon the authorities or the statutes, that his error is unmistakable and must have been unquestionably harmful. The conclusion as to the inadequacy of the charge is predicated by the court upon his failure to charge that special damages cannot be recovered without proof of them by evidence. Tomlinson v. Derby, 43 Conn. 562, 567; Smith v. Whittlesey, 79 Conn. 189, 191, 63 A. 1085, 7 Ann. Cas. 114.

This rule is not applicable to the action brought by a parent for loss of earnings of a minor child of tender years resulting from injuries suffered by the minor through the negligence of another. Evidence of loss of earnings of an adult, and perhaps of a boy between 14 and 21, may be available, but evidence of the loss of earnings of a minor child, 3½ years of age, from the time he suffered injuries from the negligence of another to the time when he shall become 21, is problematical and speculative. It is uncertain what part of this period he will live, or what his condition of health will be during such period. It cannot be told what character, competency, and capacity or personality he may develop, or what field of usefulness he may be fitted for, or what his earnings will be. To procure evidence of the future earning capacity of a child of tender years, would, in most cases, be impossible, and result in the denial of a recovery by a parent for such loss. At best the ascertainment of the loss for a personal injury to an adult is difficult and incapable of exact measurement, but in the case of the minor child it depends upon so many contingencies as to be incapable of definite ascertainment, and must be largely an estimate based upon conjecture and speculation, weighed in the light of experience, and left upon the facts proven, to the sound judgment, experience, and conscience of the trier, court, or jury, whose judgment or verdict will not be disturbed unless it be so unreasonable as to be excessive, when the court will cause the excess to be remitted, or order a new trial. Gorham v. Cohen, 102 Conn. 567, 570, 129 A. 523; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; Netherland-American Steam Navigation Co. v.

Hollander (C. C. A. 2d) 59 F. 417; Stotler v. Railroad, 200 Mo. 142, 98 S. W. 509; Blackwell v. Hill, 76 Mo. App. 46, 54; Dalton v. Refining Co., 188 Mo. App. 543, 174 S. W. 468; Curran v. Railway Co., 112 Me. 96, 99, 90 A. 973; Trapp v. Rockford Electric Co., 186 Ill. App. 379; Graffam, Adm'x, v. Saco Grange, 112 Me. 508, 92 A. 649, L. R. A. 1915C, 632; Stockton v. Penn. R. Co. (C. C.) 182 F. 282; Galligan v. Woonsocket R. Co., 27 R. I. 363, 365, 62 A. 376; note to Bond v. United Railroads, Ann. Cas. 1912C, 58; Sutherland on Damages, § 1247, pp. 4922, 4936; Watson, Damages for Personal Injuries, § 514.

The trial court instructed the jury that, if they found in favor of the plaintiff's father, the recovery should include whatever loss of earnings they might find would result from the impairment of his son's earning capacity from the time he went to work until he became of age, and that the jury were bound to consider the fact that the son is subject to all of the ordinary vicissitudes of life; that he is no more free from accident, sickness, and death than anybody else, and that any award made for his impaired earning capacity in the future represents a present cash payment to him.

As far as it went, the instruction was correct. The father was entitled to recover reasonable payments made by him for the cure and care of his son and for any loss suffered by him from the impairment of his son's earning capacity during his minority. The instruction should have pointed out that the extent of the damage for the loss of the minor's services was his total earning capacity, since the father was bound to support his son during his minority, after as before his injuries. Galligan v. Woonsocket Ry. Co., 27 R. I. 363, 365, 62 A. 376; Sedgwick on Damages, § 487.

It should also have pointed out with greater emphasis the contingencies which made an award for the prospective earnings of the minor necessarily a matter of conjecture and speculation and imposed upon the jury the most careful weighing of all the factors involved in determining what the prospective earnings of the minor were. The instruction should have made it clearer to the jury that their estimate of prospective earnings of the plaintiff's son should be confined to finding the present worth of the total estimated amount by which the son's earning capacity was diminished during the period of his minority from 14 to 21 years, when he might under our law be free from the obligation of attending school. The court should also have instructed the jury as to the method of ascertaining the present worth; that is, that the jury should first find the total diminution of the minor's earning capacity during all of this period, reaching their estimate after a consideration of all of the facts in evidence, weighed in the scales of their own experience, and making all reasonable deductions for the contingencies to which we have referred, and then ascertaining the sum which would represent the present worth of the ascertained loss from the diminution of earning capacity. Kost v. Ashland Borough, 236 Pa. 164, 169, 84 A. 691. The instruction upon such a subject should also ordinarily contain a caution to the jury

that the sum so awarded for the loss by a parent of the minor's earnings should be such as would fairly and reasonably compensate him for such loss, and that in making their estimate the jury should be careful to separate sentiment from the ascertainment of the pecuniary loss.

The trial court ought not to have set aside the verdict conditionally without making an allowance for the loss to the father of the estimated earnings of the son. While the remittitur of $2,965, conditionally fixed by the court, was greatly excessive, the jury were entitled to have found an award of substantial proportions for such loss of earnings, and the court, in setting aside the verdict conditionally, should have made a reasonable allowance for such loss. The opinion in the case of Edward Jackiewicz determines the several matters contained in defendant's bill of exceptions and finds error in the instruction to the jury in reference to some of these matters. Under these circumstances we are unable to order a judgment to be entered upon the verdict for such amount as would include such loss of earnings—a new trial is unavoidable.

There is no error.

All concur.

CLARKE v. EIGHTH AVE. R. CO.

Court of Appeals of New York, 1924. 238 N. Y. 246, 144 N. E. 516, 37 A. L. R. 1.

Action by Thomas Clarke against the Eighth Avenue Railroad Company. From a judgment of the Appellate Division, First Department (207 App. Div. 905, 202 N. Y. S. 920), affirming judgment for plaintiff, defendant appeals by permission. Reversed, and new trial granted.

McLAUGHLIN, J. On the 20th of August, 1920, the plaintiff's son, then between eight and nine years of age, was struck by one of the defendant's cars and sustained personal injuries which necessitated the amputation of his legs below the knees. The father brought this action to recover for the loss of services of his son, expenses incurred for care, medical treatment, and the furnishing and keeping in repair of artificial limbs. He had a verdict for $15,000, and the judgment entered thereon was unanimously affirmed by the Appellate Division and leave to appeal denied. Such leave, however, was given by this court.

Prior to the trial of the present action, the father, as the guardian ad litem of his son, brought an action to recover damages for the son's injuries. That action was tried prior to this and the plaintiff had a verdict for $42,500. The judgment entered on that verdict was unanimously affirmed by the Appellate Division, and no appeal taken therefrom. After such affirmance the defendant paid to the father, he in the meantime having been appointed general guardian, the amount of the judgment. At the trial of the present action, the judgment in the other action having been paid, the defendant conceded its negligence. After such concession the only question litigated and submitted to the jury

was the amount of damage to which the plaintiff was entitled. It was conceded that the plaintiff was entitled to recover the value of the services of the son during his minority, less what it would have cost during such time to care for and maintain him had he not been injured.[7]

It was, however, seriously contended by defendant that the plaintiff was not entitled to recover, in addition thereto, the value of prospective medical treatment and increased expenses for care and maintenance beyond the date of the trial. The court held otherwise, against the objection and exception of defendant's counsel, and testimony was admitted as to what medical treatment would, with reasonable certainty, be required, and its probable cost, prior to the time the son become 21 years of age; also, during that time, the increased expense for care and maintenance which would be required as well as the cost of replacing and keeping in repair the artificial limbs, and the fact that for such items the father had, prior to the trial, expended $1,088.

The case was submitted to the jury with instructions that it could include in its verdict the cost of these items, in addition to the value of the lost services. Exceptions were duly taken to such instruction.

After the $42,500 was paid, the father obtained from the Surrogate's Court an order permitting him to take therefrom and pay to himself, personally, $1,088, the amount theretofore paid by him for the son's benefit; also permitting him to take from the income of the fund, and use for the support, education, and maintenance of the son, $125 per month.

The validity of the judgment appealed from is challenged upon two grounds: (1) The admission of testimony as to prospective medical treatment, its cost, and the increased cost of care and maintenance; and (2) permitting the plaintiff to recover the $1,088 paid or incurred by him prior to the trial. These alleged errors will be considered in the order stated.

First. The plaintiff was entitled to recover, the injuries and negligence being conceded, an amount which the jury might fairly say from the evidence was sufficient to compensate him for the prospective loss of services of the infant during his minority, less what it would have cost to have supported and maintained him during that time had he not been injured. He was also entitled to recover, unless otherwise paid, the expenses actually and necessarily paid out or incurred by him for medical treatment and increased care and maintenance prior to the trial. I do not think, however, that he was entitled to recover, during the infant's minority, the estimated cost of prospective medical treatment, or the estimated cost of the increased care and maintenance subsequent to the trial. These were items of damage which personally belonged to the infant, and had to be recovered, if at all, and probably were taken into consideration by the jury, in the action brought for his benefit. The infant, and not the father, was entitled to a recovery for these items.

7 But see the preceding case on this point.

This seems to me much the better rule for the infant in an action of this character. It insures that whatever sum is recovered will be more likely to be used for the infant's benefit than if a recovery be permitted by the parent. Obviously, both cannot recover. If the infant recover, then, usually, security has to be given to insure the proper use and disposition of the sum awarded. On the other hand, if the parent be permitted to recover, then the recovery becomes his property. He can do with it as he sees fit. He can will it away, or, if he dies without a will, it becomes part of his estate. In either case, the infant might receive little or no benefit from it. The natural instinct of a parent to properly support his infant children does not always prevail. It is a matter of common knowledge that some do not, and resort has to be made to the statute to compel them to do so. Some parents actually abandon their infant children and leave them objects of charity, or to be maintained and supported by the kindness of relatives or friends.

The view thus expressed seems to be sustained, so far as the question has been considered, not only by this court, but in other jurisdictions. Thus, in Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65, which was an action brought by a parent for loss of services of a minor child, due to the negligence of the defendant, it was held that the plaintiff was entitled to recover for the expenses actually and necessarily incurred down to the date of the trial, but not for future, prospective, contingent expenses. Judge Andrews, who wrote the opinion, in which the other members of the court concurred, reversing the judgment because prospective future expenses had been permitted to be recovered, said:

"We are of opinion that in an action by a parent, founded on loss of service of the child, only expenses actually incurred by the parent for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child. * * * A recovery in the child's action for a personal injury, for prospective medical services, where the fund recovered is usually preserved through a guardian, or in other ways, will be most likely to secure such services when needed." Page 99 (16 N. E. 67).

This authority was cited with approval in Barnes v. Keene, 132 N. Y. 13, 29 N. E. 1090, and in Netherland-American Steam Navigation Co. v. Hollander, 59 F. 417, 8 C. C. A. 169.

Shearman & Redfield on Negligence, vol. 3 (6th Ed.) § 763, states that a parent in an action to recover damages for the loss of service of a child is not entitled to recover future medical expenses, as those are to be recovered by the child himself; that, if both were entitled to recover, then it would necessarily follow that the negligent party would be liable to twice pay the value of the damage which he had done; "either alternative is contrary to good judgment and common sense."

The statement thus made was approved in Durkee v. Central Pacific R. Co., 56 Cal. 388, 38 Am. Rep. 59.

[The remainder of the opinion is devoted to the question of whether the plaintiff was entitled to recover the amount which he had already expended for the care and cure of his son, which amount had been repaid him. The learned judge held he was not.]

Upon both grounds, therefore, I think the judgments appealed from should be reversed and a new trial granted, with costs in all courts to abide the event.[8]

HISCOCK, C. J., and POUND and ANDREWS, JJ., concur. CARDOZO, CRANE, and LEHMAN, JJ., concur on first ground stated in opinion.

Judgments reversed, etc.

[8] Ordinarily, expenditures already made by the parent for the care and cure of the child, are recovered by the parent. Nederlandsch-Amerikaanschestoomvaart-Maatschappij v. Hollander (C. C. A.) 59 F. 417, 20 U. S. App. 225 (1894); Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671 (1848); Galligan v. Woonsocket St. Ry. Co., 27 R. I. 363, 62 A. 376 (1905). But the parent cannot recover for the pain and suffering of the child. Wilkie v. Roberts (Fla.) 109 So. 225 (1926); St. Louis S. W. Ry. Co. v. Campbell, 32 Tex. Civ. App. 613, 75 S. W. 564 (1903). Nor for the disfigurement of the child, except as it would affect his capacity to render services during minority. Wilkie v. Roberts, supra.

The right of the child to sue and recover for the injury to him, and for loss of earning capacity after he is of age, is, of course, entirely separate from the parent's right to recover for the injury to his right to the child's services during minority, and medical expenses already incurred. The parent cannot release the child's right. Missouri Pacific Ry. Co. v. Lasca, 79 Kan. 311, 99 P. 616, 21 L. R. A. (N. S.) 338, 17 Ann. Cas. 605 (1909); O'Brien v. Loeb, 229 Mich. 405, 201 N. W. 488 (1925). In litigation, the interests of the child are represented by a guardian ad litem or next friend, but any compromise or settlement made by such representative or by the parents must have the careful and considerate approval of the court, as to its reasonableness and propriety, and a mere formal approval will not make the settlement conclusive. Missouri Pacific Ry. Co. v. Lasca, 79 Kan. 311, 99 P. 616, 21 L. R. A. (N. S.) 338, 17 Ann. Cas. 605 (1909).

See, also, Schaff v. Sanders (Tex. Com. App.) 269 S. W. 1034 (1925).

"NOTE ON THE EFFECT OF THE MINOR SUING FOR TORT TO HIMSELF BY HIS PARENT (WHO IS ENTITLED TO HIS EARNINGS AND SERVICES) AS NEXT FRIEND OR GUARDIAN.—Under such circumstances it is not error to allow the infant to recover for loss of earnings during minority: (a) When the damages to the minor by reason of loss of earnings during minority are set forth in the petition. Abeles v. Bransfield, 19 Kan. 16 (1877). (b) When the next friend or guardian testifies on the trial, as a basis for the recovery of such damages for loss of earnings by the minor. Chesapeake & O. Ry. Co. v. Davis, 119 Ky. 641, 60 S. W. 14 (1900); Zongker v. People's Union Mercantile Co., 110 Mo. App. 382, 86 S. W. 486 (1904). In Farrar v. Wheeler, 145 F. 482, 75 C. C. A. 386 (1906), the action by the next friend was not inconsistent with his claim for damages to his right as a parent. (c) When the next friend or guardian of the minor procures an instruction to be given that the infant is entitled to damages by reason of loss of earnings during his minority. American Car Co. v. Hill, 226 Ill. 227, 80 N. E. 784 (1907).

"It seems, however, that the mere commencement of the suit of the minor by its parent as next friend or guardian does not waive the parent's right to a suit in his own name for loss of the child's services during his minority. Slaughter v. Nashville, C. & St. L. Ry. Co. (Ky.) 90 S. W. 243 (1906), rehearing denied 91 S. W. 713 (1906). Especially where the next friend as parent had

TROW v. THOMAS.

Supreme Court of Vermont, 1898. 70 Vt. 580, 41 Atl. 652.

[Action by George W. Trow against William T. Thomas for damage to plaintiff's right in plaintiff's child by reason of the personal injuries inflicted upon the child by the negligence of the defendant. There was judgment for the plaintiff. After verdict the defendant moved, among other motions, for arrest of judgment upon the ground that the declaration did not set out any legal cause of action].

TAFT, J. [upon the motion in arrest of judgment]. * * * The question is presented whether the plaintiff can maintain an action against a person through whose negligence injuries are inflicted upon the plaintiff's infant child, too young to render service to its parent, to recover the necessary medical and other extra expenses in caring for the child until its death, such injuries resulting in death some months later. In cases of tort the general rule is that, if one person is injured by the negligence of another, a recovery can be had in all instances whenever there is legal injury and actual damages as the result of the injury. To constitute a tort, two things must concur: a wrongful act committed by the defendant, and proximate legal damage to the plaintiff. A master can maintain an action for the beating of his servant per quod servitium amisit. Mary's Case, 9 Coke, 113. The loss of service is the cause of action. The cases so holding are too numerous to need citation. This doctrine also applies to actions brought by a parent for injuries to his child, when brought for loss of the child's services. In such cases the right of action is founded on the relation of master and servant, and not on that of parent and child, and it applies in actions for seduction.

These actions are based upon loss of service, to which the master or parent is entitled. It is stated in some of the books that a father cannot maintain an action for a battery on his child unless he avers and proves a loss of service. But this rule is not in accord with the law of tort which gives a right of recovery for damages resulting from the negligent act of another; and Metcalf, J., states in the opinion in Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671, that the authorities cited in support of such a rule did not support it. In that case the father recovered for his trouble and expense in the care and cure of his child injured by a mischievous animal, and a like recovery was had in Durden v. Barnett, 7 Ala. 169. There is no reason why a parent cannot sustain an action for the tortious act of a defendant,

already recovered judgment. Texas & Pac. Ry. v. Morin, 66 Tex. 225, 18 S. W. 503 (1886)." Kales' Cases on Persons, pp. 106, 107.

On the question of whether the workmen's compensation statutes have destroyed the parent's right to recover for injuries to his child, received in the course of employment, see Allen v. Trester, 112 Neb. 515, 199 N. W. 841 (1924).

when the act results in injury to the child, and loss to the parent by being put to damage and expense in the care and cure of the child, and fulfilling those obligations that the law imposes upon him in respect to his children. The parent is under a legal liability to take care of and support his infant children. There is no reason why a parent can maintain an action to recover damages sustained in the loss of service of his child that does not apply with equal force in aid of a recovery for the loss he is subjected to in nursing and caring for it when injured by the defendant's negligence. Logically, there is no reason why he may not recover the damages he is subjected to in respect to such nursing and care. We hold that he has the right to recover such expenses necessarily sustained by him during the life of the child. Such damages are not those resulting from the death of the child, such as the expense of the child's burial and the loss of services subsequent to its death; and his right to recover damages sustained prior to its death is not affected by the death of the child.

The plaintiff seeks further to recover the expense of providing suitable burial for the child. This he cannot do; for, as said by Rowell, J., in Sherman v. Johnson, 58 Vt. 40, 2 Atl. 707: "Authorities are numerous, and well-nigh uniform, that at common law the death of a human being affords no ground for an action for damages." In this latter cause the plaintiff recovered in the court below his damages for the medical attendance upon his son during his sickness, the expense of his burial, and the services of his son had he lived from the time of his death until the age of 21. There is no intimation in the case that there cannot be a recovery in a case like the one at bar. The court in that case were requested to charge that no damages could be recovered for the pecuniary injuries resulting from the death of the plaintiff's minor son. The request was denied, and a recovery permitted for the expense of caring for his son during life, his burial expenses, and his services until the age of 21 had he lived. The judgment was reversed. The court did not say that the plaintiff could not recover for his expense in the care for the child and in burying him, but said: "The court refused this request, but charged that the plaintiff might recover for loss of services of his son until he would have been of age. In this there was error, for the authorities are numerous, and well-nigh uniform, that the death of a human being, though clearly involving pecuniary loss, affords no ground for an action of damages." It is clear the court regarded the recovery of damages for the loss of services after death as the error. We hold that, if a minor child is injured by the negligence of another, the father, who is under a legal obligation to support the child, can maintain an action against the negligent person to recover the necessary extra expenses he is put to in caring for the child in its injuries which proximately resulted from the negligent acts, and such recovery may be had although the child subsequently dies, limiting the recovery to damages sustained prior to the child's death. It is difficult to perceive why, upon principle, the

parent cannot recover the damages, resulting from the death, e. g. the expenses of the burial, and for the loss of service of his child after death and before majority. But the rule stated in Sherman v. Johnson, supra, has long been regarded as controlling all actions brought for damages resulting from the death of a person. Such has been the unvarying law in England from time immemorial, which originated in cases when the death was felonious, the offense capital, and the private injury merged in the public offense. Whether this rule ought to apply in cases of negligence not felonious may be questioned, but such has been the settled doctrine in this country. Insurance Co. v. Brame, 95 U. S. 754, 24 L. Ed. 580. One of the cases holding otherwise is Cross v. Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61, in which a recovery was permitted by a husband against a surgeon, whose negligence caused the death of the wife, for his costs, expenses, and loss of society. Considering the uniform decisions upon this question, and the provisions made by our statutes for damages resulting from death, we do not depart from the rule stated in Sherman v. Johnson, supra, whatever view we might take of it if the case were of novel impression. There was error in including in the judgment $24, the expenses which the jury found were the costs of the burial. This disposes of all the questions argued.

Judgment reversed, and judgment for the plaintiff to recover the amount of the verdict less the burial expenses of $24.[10]

[10] The general view is that there can be no recovery by a parent, as parent, for the death of a child. Osborn v. Gillett L. R. 8 Exch. 88 (1873); Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527, 4 Ann. Cas. 515 (1905). But see Amos v. Atlanta Ry. Co., 104 Ga. 809, 31 S. E. 42 (1898), contra. There can be recovery for loss of services and medical expenses from the time of the injury until death. Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38 (1885); Callaghan v. Lake Hopatcong Ice Co., 69 N. J. Law, 100, 54 A. 223 (1903).

If the child was, at the time of the injury, too young to render services, and was still too young at the time of death, there can, of course, be no recovery by the parent for loss of services. Southern Ry. Co. v. Covenia, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312 (1896). Also, if death did not ensue, but the child was too young at the time of the injury to render services, and the effects of the injury will not extend to the time when the child will be old enough to render services, there can be no recovery for loss of services, but there can be a recovery for the expenses of the care and cure of the child. Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Rep. 671 (1848). As to this latter point, the discussion in Dennis v. Clark shows that there was doubt about it, in the English cases. From these precedents the erroneous conclusion has sometimes been drawn that there can be no recovery by a parent for loss of services when the child is too young at the time of the injury to render services. See Crenshaw v. Louisville & N. R. Co., 15 Ga. App. 182, 82 S. E. 767 (1914); Amos v. Atlanta Ry. Co., supra, semble.

Under a wrongful death statute, providing for the recovery of "such damages as are just, with reference to the pecuniary injuries resulting from such death," a mother, suing as administratrix and next of kin, was allowed to recover for pecuniary benefits to be expected from her son who had been killed, even extending beyond the period of his minority. D'Angelo v. Rutland Ry., Light & Power Co., 100 Vt. 135, 135 A. 598 (1927). The case contains a full discussion of the authorities.

MAD.D.R.

CLARK v. FITCH.

Supreme Court of New York, 1829. 2 Wend. 459, 20 Am. Dec. 639.

This was an action on the case for debauching the daughter of the plaintiff, tried at the Washington circuit, in June, 1825, before the Hon. William A. Duer, one of the circuit judges.

The daughter of the plaintiff testified that, when seduced, she was about nineteen years of age. She was at service at the time as a hired girl, in the town of Pawlet, Vermont; her father resided in the town of Sandgate. She had lived with her father until he married a second time, when he told her that she might remain at home, or go out to work, as she pleased, but if she left his house she must take care of herself; he then gave her her time absolutely, and relinquished all claim to her wages and services. He afterwards removed to the town of Antwerp, in this state, and requested her to go with him, which she declined. Her child was born in the house of Ira Hurd, in Sandgate. The expenses of her lying-in were paid by him, and he looks to her father for them. Since her father removed to Antwerp, and since the child was begot, she has not been in his house. He knew nothing of her having a child, had been put to no trouble or expense in consequence thereof, and had no knowledge of this suit; it having been brought at her request and for her benefit. Previous to the child being begotten, the defendant had visited her about three months. The plaintiff's counsel offered to prove by the daughter that, previous to the improper intercourse between the defendant and her, the defendant had promised her marriage, which evidence being objected to, was rejected by the judge. Hurd, the person at whose house the child was born, testified that he had paid the expenses of the lying-in, and that he held the plaintiff responsible for the amount.

The plaintiff having rested, the defendant moved for a nonsuit, which was refused by the judge, and, the cause being submitted to his charge, he instructed the jury that the foundation of this action is the loss of service and expense incurred; that, where seduction was actually proved, courts always charged in favor of, and jurors always were justifiable in giving, exemplary damages, otherwise the plaintiff was entitled to recover only for actual damages; that seduction was generally made out by a train of circumstances, such as continued attentions for a length of time, and the practice of arts and management to deceive and mislead the female; that in this case there were no circumstances shown from which the jury might infer seduction; on the contrary, they might rather infer a voluntary assent on the part of the daughter, who had been permitted by her father to go out to work alone and unprotected, and, in so doing, her father was guilty of culpable neglect on his part, which the jury ought to take into consideration; that there could be no seduction without evidence of an intention to marry, of which there was none in this case; that, if the jury were satisfied that no seduction had been proved, it would be for them to inquire the amount of damages incurred

and actually paid by the plaintiff, and, if nothing was shown to have been paid, the plaintiff was not entitled to recover, except for loss of service; that there was no proof of any expense paid by the plaintiff, nor any evidence of the value of the daughter's services; on the contrary, it appeared that the plaintiff had relinquished his right to her services. Unless, therefore, the jury were satisfied that a case of seduction had been made out, the plaintiff was not entitled to a verdict. The counsel for the plaintiff excepted to the charge, and the jury found a verdict for the defendant.

C. L. Allen, for plaintiff, moved to set aside the verdict as against evidence, and for the misdirection of the judge.

S. Stevens, contra.

By the Court, SAVAGE, C. J. It is true indeed, "and pity 'tis, 'tis true," that this action is founded technically upon the supposed loss of service alone, the father and daughter being considered as standing in the relation of master and servant; yet it is perfectly well known that the actual loss of service constitutes very little or no part of the real ground of the action. The largest verdicts are often, and most generally, given in cases where the daughter rendered no real service to the parent. The action is supported, not so much to remunerate in damages for the loss of service and expenses incurred, as to punish the offender for his dishonorable and disgraceful conduct, by way of atonement for the injury inflicted upon the subject of his seductive arts, and upon her parents and their family.[11]

The father is not permitted to maintain this action, unless he can show the relation of master and servant existing either actually or constructively. If the daughter is above twenty-one years of age, the father cannot prosecute unless the daughter resides with him and performs some acts of service, and any acts, however slight, will answer the purpose; but if the daughter is under twenty-one, he may maintain the action, although she does not live with him, and is servant de facto to another, provided she is servant de jure to him; and, in ascertaining whether the daughter is the servant, I apprehend the same liberality is to be extended to the father whose daughter within the years of minority is debauched as to him whose daughter is above that age. It is, indeed, a legal fiction to call the daughter a servant who renders no service in fact, except, perhaps, making tea, mending stockings, etc., and is not under the control of her father. And it is also something like

11 "Especially has this been done, and the verdicts upheld, in actions for seductions, where the loss of the daughter's services and the value thereof have always been regarded as innocent legal fictions, used to give the court jurisdiction, while the real measure of damages was the shame, mortification, disgrace, dishonor, and mental suffering inflicted upon the parent by the wrongful act of the seducer." Woods, J., in Riddle v. McGinnis, 22 W. Va. 253 (1883). Accord: Anthony v. Norton, 60 Kan. 341, 56 P. 329, 44 L. R. A. 757, 72 Am. St. Rep. 360 (1899); Lipe v. Eisenlerd, 32 N. Y. 229 (1865). Observe that, in seduction cases, the wounded feelings of the parent are an element of damage.

fiction to give the appellation of servant to a daughter who has been permitted, during her minority, to place herself in the service of others, and receive the wages of her own earnings for her own use. It would comport much better with common sense to say that a father, whose daughter has been seduced, shall maintain an action for the injury done to his wounded honor and his parental feelings; but such is not the law, and, unless a party brings himself within the established principles in cases of this kind, he cannot maintain his action.

This case is, in many of its circumstances, like that of Martin v. Payne, 9 Johns. R. 387, 6 Am. Dec. 288. In both, the daughter when seduced was in the service of another person; in both, the daughter, but for the seduction, considered herself as emancipated from her father's control. In Martin v. Payne, the daughter, after seduction, returned to her father, who paid the expenses resulting from her situation; in this case, the daughter did not return, but a friend paid those expenses, and claims the same from the father, who is liable to pay them.

The only circumstances in this case, which are not found in other cases are: 1. That the father gave his daughter her time absolutely. 2. He in fact incurred no expense. 3. The suit was not instituted by him. When the daughter left her father's house, he gave her her time; that is, he allowed her to receive her own earnings, and told her she must provide for herself. The effect of this would be that, if her employer paid her wages during her minority, the father could not compel payment again to him. But, suppose the daughter had become sick and infirm, would not the father have been liable for her support? And, in that event, surely, she would be returned to her former situation of servant to her father; and, even without any such necessity, I apprehend the paternal rights of the father over the child were not relinquished by what passed between them. There was no consideration for the relinquishment of his daughter's services, and, in my opinion, he might at pleasure revoke the license he had given his daughter, and call her home and employ her in his service till she should arrive at maturity. If I am correct in this supposition, then the language of the late Chief Justice is applicable, when he said, in Martin v. Payne, that the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services. This control is always presumed where the daughter is under twenty-one; and Judge Reeve, in his Domestic Relations, p. 292, contends that, even where the daughter is an apprentice to another, the father may maintain the action. He says: "Where a daughter is bound out as an apprentice, living with her master, a rigid adherence to the idea that the loss of service is the ground of this action would prevent the father's recovery; but, if we consider this action as really having its foundation in another principle, viz. the disgrace of the family, it would be no objection to the maintenance of this action, although the daughter should live as an apprentice to a master." In the case supposed by Judge Reeve, there would be a difficulty which he does not notice, viz. that the master

to whom the daughter was an apprentice would have a right of action, and the defendant would be liable to two suits.

This court, in the case of Sargent v. Denison, (5 Cowen, 116,) held that, but for the canceling the indentures of apprenticeship in that case, the mother could not have been entitled to sustain the action, and that it was not necessary that the relation of master and servant should exist at the time of seduction; but the question should be, in an action on the case, upon whom has the consequential injury fallen? In this case, if I am right in holding that the plaintiff is liable to Hurd for the expense incurred by him about the sickness of the daughter, it follows that the consequential injury has fallen upon the plaintiff; for, although he has actually expended nothing, yet he is liable to pay. From these circumstances, it results that the relationship of master and servant existed, that the loss has fallen upon the father, and of course he is entitled to sustain the action.

But it is said the plaintiff never instituted this suit in fact. Whether he did or not seems to me not a matter of inquiry upon the trial. If he sanctions the suit, though commenced without his orders, he has a right to do so; and, if he should disapprove it, the proper course to put an end to it is by motion. The attorney is responsible for any improper use of the plaintiff's name. The witness may not know whether the plaintiff has or has not directed or approved the suit.

I am of opinion, therefore, that the judge at the circuit was correct in refusing to nonsuit the plaintiff, but that the jury were misled by his charge. He correctly rejected evidence of a promise of marriage (1 Johns. R. 299;) but he stated that there had been no seduction, no courtship which proved an intention of marriage. It appears from the testimony that the defendant had continued his attentions to the daughter for several months before the seduction, which seems to me sufficient on that point; and in the view that I have taken of this subject, the judge also erred in saying that the plaintiff had no right to his daughter's services.

There must therefore be a new trial, costs to abide the event.[12]

KENNEDY v. SHEA.

Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 147, 14 Am. Rep. 584.

AMES, J.* In order to maintain an action of this description, the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed, either in fact or constructively, at the time of the seduction. According to numerous decisions of the

[12] In Thompson v. Ross, 5 Hurl. & N. 16 (1859), no recovery was allowed, where the daughter was employed by another as a domestic servant, and assisted frequently at home by the grace of her employer.

* Statement of facts omitted.

courts of New York, Pennsylvania, and some other states of our Union, this relation is sufficiently proved by evidence that the daughter was a minor, and that the father had a right to her services. Those decisions also lay down the rule that the effect of such evidence is not impaired by the fact that, at the time of the injury, she was not living in her father's family, but was in the actual employment of another person. It was held that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter had been actually bound out as an apprentice. In other words, the relation results constructively from his right to reclaim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from her home. Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Mulvehall v. Millward, 11 N. Y. 343; Hornketh v. Barr, 8 Serg. & R. (Pa.) 36, 11 Am. Dec. 568; Vanhorn v. Freeman, 1 Halst. 322; Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486. With regard to her earnings, the privilege allowed to her to retain a portion of them in her own hands, in order to purchase clothing, must be considered as permissive only. There is nothing in the report inconsistent with an absolute right on the part of the father to terminate her engagement with her employer, and to require her at any moment to return to his own house. As against the excepting party, it is to be presumed that he offered to prove every fact that he was in a condition to prove, having a tendency to disprove the existence of the relation of master and servant between the plaintiff and his daughter. There having been no attempt to prove the contrary, it may be assumed that she had never been emancipated from the paternal control, and that her father was entitled to her earnings, so that she was de jure his servant. So far as the American authorities go, therefore, the plaintiff has done all that was incumbent upon him in this part of the case.

The rule adopted in the English courts apparently requires that the relation of master and servant should be proved with greater strictness where the daughter does not reside under the paternal roof; and, according to Thompson v. Ross, 5 H. & N. 16, the action cannot be maintained, if, at the time of the seduction, she was a domestic servant in a family other than that of her father. But it is well settled, even under the English rule, that the amount and value of the actual service to the father are of but little importance, and that any service, however slight, is sufficient. Bennett v. Allcott, 2 T. R. 166. It is enough if the father had a right to her services, and if some service was rendered. The case finds that he was entitled to her services a portion of every week, and that she was actually employed on Sundays at his house, in cooking and other domestic work, upon his requirement. If so, her entire service did not belong to her employer, Warner, and the action could well be

maintained even under the English decisions. See judgment of Bramwell, B., in Thompson v. Ross, ubi supra.

The evidence which was admitted under objection, as to the fact that the daughter lived and rendered services in her father's family, for about two weeks, several months after the seduction, although perhaps open to objection as immaterial, cannot have had any effect upon the verdict, and does not have any bearing upon the plaintiff's right to recover. The jury were instructed that the relation must be proved to have existed at the time of the seduction.

As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass vi et armis might have been sustained. It would be no defense that the crime was rape and not seduction. Furman v. Applegate, 23 N. J. Law, 28. The father in such cases may always seek his remedy in an action on the case. Bennett v. Allcott, ubi supra. Chamberlain v. Hazelwood, 5 M. & W. 515. 2 Greenl. Ev. § 571. * * *

Exceptions overruled.

DAIN v. WYCOFF.

Court of Appeals of New York, 1852. 7 N. Y. 191.

[This action was brought by the plaintiff for the seduction of his daughter. It was tried at Tompkins circuit in April, 1850, before Justice Gray, when a verdict for one thousand dollars was rendered for the plaintiff. A motion for a new trial made upon bill of exceptions was denied by the general term of the supreme court in the sixth district and judgment given upon the verdict.

It appeared by the bill of exceptions that Sally Dain, the plaintiff's daughter, when about fourteen years of age was bound as an apprentice to the defendant, who shortly after seduced her and had criminal intercourse with her frequently, until she was sixteen years of age, when she became pregnant. She was then induced by him to take drugs with a view to produce an abortion, but the attempt to do this was unsuccessful and she gave birth to a living child.]

GARDINER, J. * * * 3. The defendant moved for a nonsuit upon the ground that the relation of master and servant did not subsist between the plaintiff and his daughter when she was seduced. It appeared that she was the apprentice of the defendant and bound to live with him until she was eighteen, and that the seduction occurred while she was thus in fact and in law the servant of the defendant. The relation of master and servant is the foundation of the action for loss of service. Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, and cases there cited. The plaintiff to maintain the action must have

had the right to the service of his daughter. But he proved that she not only resided with the defendant but owed him service when the injury was committed. Unless the defendant procured the daughter to enter into his service with a view to her seduction, of which there is no pretence, the plaintiff should have been nonsuited.

We all agree that the judgment should be reversed, for the reason last suggested. My Brethren express no opinion upon the other points in the case.

WELLS, J. (after stating the facts). It is abundantly settled by authority that in order to sustain an action of this description it must appear that the relation of master and servant existed at the time the injury complained of was committed. The action is founded on the loss of service, and in order to maintain it the relation must be actual or constructive. If the plaintiff is not receiving the services of his daughter at the time he must be in a situation and have the legal right to command them at pleasure. In this case the plaintiff's daughter was not at the time she was seduced and got with child his servant but was the servant of the defendant, who had the legal right to and was actually receiving her services. In the late case of Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, Bronson, Ch. J., has given the whole subject of the principles of this action a full examination, and it is unnecessary to repeat the views which are there so well stated. The case is in point and in effect decides this. According to the principles held by this court in the case referred to it is impossible for the plaintiff in the present case to sustain an action upon the proof which was given at the trial.

Judgment reversed and new trial ordered.[13]

BEAUDETTE v. GAGNÉ.

Supreme Judicial Court of Maine, 1895. 87 Me. 534, 33 Atl. 23.

WISWELL, J. Action on the case by a father for the seduction of his adult daughter. The defendant alleges exceptions for the following causes:

* * * * * * * * * * *

IV. Lastly, exception is taken to the refusal of the court to instruct the jury that unless the services rendered by the daughter were such as the plaintiff could command and were not voluntary on her part, the plaintiff could not recover.

This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a

[13] In Bolton v. Miller, 6 Ind. 262 (1855), an improperly drawn indenture of apprenticeship of the daughter to a third person, under which she was living with her supposed master, did not prevent her father from recovering for her seduction.

minor daughter such relation is presumed to exist between her and her father, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. This was decided to be the law in this State in the case of Emery v. Gowen, 4 Greenl. 33, 16 Am. Dec. 233, a case which has been frequently cited and followed by the courts of other states.

The learned justice who presided, in his charge to the jury, fully and clearly explained the somewhat peculiar rules of law which are applicable to an action of this kind, in the course of which he said: "But if, at the time of the seduction, she is of age, that is, more than twenty-one years of age, then it must appear that the family relations continued to exist, that she was at least a resident of her father's family and performed some service. But it is held that the most trifling services, under those circumstances, are sufficient to create the relation." This instruction was all that the defendant was entitled to and was in accordance with the weight of authority. See Emery v. Gowen, supra; Mercer v. Walmsley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486; Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; Davidson v. Abbot, 52 Vt. 570; Martin v. Payne, 9 Johns. (N. Y.) 388, 6 Am. Dec. 288, and cases collected in Am. & Eng. Encycl. of Law, vol. 21, pp. 1009 to 1017, under title of Seduction.

It is not necessary that the services of an adult daughter should be such as the father can command. Ordinarily a father cannot command the service of a daughter of age,—he cannot compel the service of his child over twenty-one as he can that of his minor child. It is sufficient if by mutual assent the relation of master and servant did in fact exist.

Exceptions overruled.[14]

[14] The father of an adult daughter, if she is seduced while in the service of another, cannot recover, though she returns to her father's house for her confinement. Nickleson v. Stryker, 10 Johns. (N. Y.) 115, 6 Am. Dec. 318 (1813). See, also, Mercer v. Walmesley, 5 Har. & J. (Md.) 27, 9 Am. Dec. 486 (1820); Hudkins v. Haskins, 22 W. Va. 645 (1883).

See, however, the language of the court in Anthony v. Norton, 60 Kan. 341, 56 P. 329, 44 L. R. A. 757, 22 Am. St. Rep. 360 (1899), to the effect that the parental relation alone, even though the daughter be of age, is sufficient, under the Kansas Code of Procedure, to sustain an action for seduction. But see Riddle v. McGinnis, 22 W. Va. 253, 272 (1883), where a statute abolishing the necessity of pleading or proving loss of service in a seduction case was construed as not abolishing the necessity of proof that the relation of master and servant existed. See Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696 (1889), applying a statute clearly abolishing the necessity of the relation of master and servant in seduction cases.

A mother, who has the custody of her daughter by reason of the death or desertion or divorce of her husband, may sue for the seduction of her daughter. Anthony v. Norton, supra; Malone v. Topfer, 125 Md. 157, 93 A. 397, Ann. Cas. 1916E, 1272 (1915); Coon v. Moffet, 3 N. J. Law, 583, 4 Am. Dec. 392 (1809); Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441 (1874). Contra: South v. Denniston, 2 Watts (Pa.) 474 (1834). See, also, note 1, p. 65, supra.

To the effect that the mother may sue, even though the father was living at

PYLE v. WAECHTER et al.

Supreme Court of Iowa, 1926. 202 Iowa, 695, 210 N. W. 926, 49 A. L. R. 557.

Action by a mother to recover damages for the alienation of the affections of a minor son. A demurrer to the petition was sustained, and from a judgment dismissing the petition the plaintiff appeals. Affirmed.

VERMILION, J. The petition alleges that the plaintiff is the mother of Donald Waechter, who was born in lawful wedlock and is now about 17 years of age; that for a period of more than 10 years "there has been a continuous, persistent, and concerted effort and conspiracy on the part of the defendants to poison the mind of said son" against plaintiff, and to destroy his natural filial regard, esteem, love and affection for her; that by "words, actions, and influence the defendants have wrongfully, intentionally, and maliciously poisoned the mind of said son" against plaintiff, and have "wholly alienated his natural love and affection, esteem, and regard for her"; and that "said wrongful acts and influence were intended by said defendants to prevent the said son from having anything in common with his mother and to alienate him from her." It is further alleged that as a result of the continuous, persistent, and concerted effort, both positive and negative, on the part of the defendants, the natural filial love, affection, esteem, and regard of the son for his mother have been wholly destroyed and alienated, and his mind so poisoned against her that he now considers and believes he has nothing in common with her, and has not now that proper respect, love, and affection for his mother to which by the law of nature she is entitled, and has now neither love and affection nor proper respect and regard for her.

The demurrer raises the question that the petition does not allege that the plaintiff was deprived of the custody, control, or society of her son, or of his services, and that, therefore, it does not state a cause of action.

It is conceded by counsel that no precedent is to be found in the books for the maintenance of this action. But it does not necessarily follow that the action cannot be maintained. It is universally recognized that the common law is not so rigid or inflexible but that it will reasonably grow and expand to meet the conditions of modern life. Mentzer v. Telegraph Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. And while, perhaps, its greatest growth and development have been in the field where it was called upon to meet the problems arising out of relationships more or less peculiar to the changed conditions of life and the perplexities of a complex civilization, undreamed of at the time its principles were established, yet there is also apparent the

the time of the seduction, but had died before the confinement, see Coon v. Moffet, supra, and Parker v. Meek, 3 Sneed (Tenn.) 29 (1855). Contra: Hamilton v. Long, 36 Irish L. T. R. 189 (1902).

There may be a recovery for seduction though there is no pregnancy or sexual disease, if the physical or mental health of the child is impaired in any degree. Abrahams v. Kidney, 104 Mass. 222, 6 Am. Rep. 220 (1870).

effect of modern thought in a more enlightened treatment of the natural relationships of men as they are affected by the life of today. Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227, 28 A. L. R. 320.

If the question be one arising out of, or affected by, conditions that were unknown when the doctrines of the common law had their beginning and acquired their sanction, it has ever been the boast of those peoples whose affairs it controls that the proper elaboration of its principles to meet those changed conditions will afford a solution. But where there has been no change or modification by statute of the doctrines of the common law affecting those purely natural relations of men which are unaffected by changed modes and conditions of life, the courts have been less free to depart from the rules that centuries of experience have sanctioned as all sufficient.

It is said in Davis v. Minor, 2 U. C. Q. B. 464, that it is not decisive against an action lying "that no precedent of precisely such an action can be found, when the principle upon which it is governed is not new; but if the question seems a doubtful one, and the occasions for such actions must very frequently have arisen, then the absence of any precedent is a strong argument against the action."

The acts complained of here affect one of the natural relationships of life, and are such as both history and common experience tell us have been and are of not uncommon occurrence. The case is not one where the common law must keep pace with changing conditions of life and civilization, and must be adjustable to the new conditions brought about by discovery and invention. Many instances of its growth and development to meet such new conditions might be cited.

We have long recognized, and, indeed, it is conceded by appellees, that a parent who is entitled to the care, custody, and services of a minor child may, when he is deprived thereof by another, have a right of action therefor. In the early case of Everett v. Sherfey, 1 Iowa, 356, this court, speaking by Justice Wright, said:

"That the father has a right to the care and custody of his minor children, and to superintend their education and nurture, is a proposition that does not admit of controversy. And where he is deprived of such care and custody, and of this superintendence, by the act of another, he has his remedy, by proper action, against such person, is equally clear. As it is the duty of the father to educate, protect and nurture his children, so it is his right to have their society, their services, and the control of their moral and intellectual training."

We are now asked to go further, and beyond the holding of any adjudicated case that has been found, and announce that the mother, in the absence of any allegation that she has been deprived of either the services, custody, or companionship of her minor son, or even that she was entitled thereto—unless that can be implied from the relationship itself—states a good cause of action by alleging merely that his affections have been alienated from her by the wrongful acts of the defendants.

The injury complained of may be said to be purely sentimental. The

mental anguish, for which alone plaintiff seeks to recover, results, so far as appears from the allegations of the petition, entirely from the alleged mental attitude of the son produced by the alleged wrongful acts of the defendants, and not from any outward manifestation of that attitude toward the plaintiff. There is no allegation that plaintiff was deprived of the services, custody, or control of her son, or of his assistance, association, or companionship. The son may never, under the allegations of the petition, have failed in the performance of any service or duty to which the plaintiff was entitled; he may never have been in the slightest degree remiss in rendering to her every service or attention in the way of companionship or association which the most exacting mother could expect. It is alleged, it is true, that the natural affection of the son for his mother has been destroyed, and that he believes he now has nothing in common with her. Conceding all that could be claimed for this, it is not an allegation that the son has in any respect failed in the actual performance of any natural duty or obligation to the plaintiff.

The question whether, in the absence of an allegation that plaintiff was entitled to the services, custody, or companionship of her son, she would be entitled to recover for the alienation of his affections, is not raised by the demurrer, and is, therefore, not directly involved. However, a brief consideration of the attitude of the courts toward the claim of a mother, not entitled to the services of a minor child, to recover for mental suffering occasioned by the wrongful enticing away of the child, and where she was thereby deprived of his companionship, will throw a side light on her right to recover for the alienation of his affections merely, and in the absence of more concrete injuries.

It is generally held that the father only, where he is alive and living with the mother, is entitled to recover for the loss of services of a minor child. See Soper v. Igo, 121 Ky. 550, 89 S. W. 538, 28 Ky. Law Rep. 519, 123 Am. St. Rep. 212, 11 Ann. Cas. 1171, 1 L. R. A. (N. S.) 362, and note in the latter publication; 29 Cyc. 1679. The mere allegation of the relationship of a son born in lawful wedlock does not show, in the absence of any averment of the termination in any way of the right of the father, a right in the mother to the services of their minor child. While the basis of the action of the father is the loss of services of the minor, he may also recover for injury to his feelings and the loss of the companionship of his child. But it has been held that, in such a situation, the mother cannot maintain an action for her mental suffering caused by the enticing away of the child. Soper v. Igo, supra. The court there, speaking of such a claim, said:

"We have been unable to find any case where a mother has been permitted to recover where her husband was alive and residing with her. It is true her suffering may be as great or greater than that of her husband in being separated from her child, but the law has never recognized her right to the services of the child as against the right of the husband so long as they are living together. It is contended that they both

should be permitted to sue and recover—the wife for her mental suffering, and the husband for loss of service, and also mental suffering. This appears plausible; but the rule against it has existed for so long that it should not be changed, except by legislative enactment. If this court should sustain appellant's contention, and change the rule, and permit the appellant to recover in this action, it would, in effect, permit not only the mother, but the brothers and sisters, of the child each to recover damages for mental suffering and loss of companionship."

If a mother who suffers an injury in the loss of the companionship of her minor child may not recover for the mental anguish occasioned thereby, where the father is entitled to the services of the child, how can it be said that she may recover for the mere alienation of the affection of the minor where she does not allege the loss of either his services or companionship? For, if the right of a parent to recover damages from one who entices his minor child away is, in the final analysis, based on the parent's right to the services, custody, and companionship of the child, it would seem plain that where the parent alleges no loss of either services, custody, or association no cause of action is stated. And, further, if the right of action is not fundamentally grounded upon the right of the parent to the services, custody, and control of the minor, and an action will lie for the mere alienation of the affections of the child, without the loss of either services, companionship or control, we see no sound reason why either the minority of the child, or even the presence of the parental relation, is essential to a right of recovery.

The mental anguish suffered by a parent over the loss of the affections of an adult son or daughter is not different in kind, nor necessarily so in degree, from that suffered in the case of a minor child. And, as pointed out in Soper v. Igo, supra, if the alienation of affections alone supports the action, brothers and sisters may recover. Surely no justification could be suggested, in the absence of precedent or controlling legal principle, for so extending the right to recover as for a tort, and the opening of such a Pandora's box of litigation.

It is argued that, because the law in certain cases allows a recovery of damages for mental anguish where there has been no physical injury, a good cause of action is stated in the petition. But this is not necessarily true. Broadly speaking, the law protects the individual in his person, his property, and his reputation; and, in numerous instances, where his legal rights have been invaded and there has been a breach of a legal duty owing to him, he may recover for the injury to his feelings occasioned thereby. The basis for the action, the right to maintain it, is not to be confused with the damages that may be recovered when it is maintainable. Because damages for mental suffering are recoverable in certain cases it does not follow that in every instance where the act of one is the cause of mental anguish in another an actionable wrong is committed. Where the right to maintain the action exists, the law permits a recovery of all the damages proximately resulting from the wrongful act. But because one entitled to maintain the action may suf-

fer and is allowed to recover for an injury to his feelings, it does not necessarily follow that another, merely because he suffers similarly, may, for that reason alone, maintain an action. This was the ultimate point decided in Soper v. Igo, supra. One to whom a telegram announcing the death of a near relative is sent may recover for the mental suffering resulting from a delay in its delivery; but who would contend that another, to whom the telegram was not addressed and who was unknown to the telegraph company, although enduring the same suffering, would have a right of action against the company? Where a man is slandered or prosecuted maliciously he may recover for the injury to his feelings. No one would deny that his wife or children may suffer mental anguish because of the unjust accusation against him, but would they, too, have a right of action against the one perpetrating the wrong? The right of action arises from the breach of some duty owing to the injured party or the invasion of some right, not merely from the fact that his feelings are injured by the act of another. If, as we think is the case, the right of the mother, conceding such right to exist in her, is to the services, custody, control, and companionship of her minor child, without an allegation that she has been deprived of some of these she states no cause of action.

Much is said in argument about the right of a parent suing for the seduction of a minor daughter to recover for injured feelings, disgrace, and humiliation, and it is urged that such an action is not based alone on the right to the services of the minor. That the action was originally so based must be conceded. Stevenson v. Belknap, 6 Iowa, 97, 71 Am. Dec. 392. It is an action brought by a parent for an injury to the child, and the jury may take into consideration all the parent may feel from the nature of the loss. Nothing in the nature of that action or the measure of recovery aids the appellant here.

The nearest analogy to the claim made by the appellant is to be found in the right of one spouse to recover for the alienation of the affections of the other. The right of action in that case is based on the loss of the consortium, the conjugal society, and assistance of the spouse. It is a right which exists by virtue of the marriage relation, and is peculiar to it. There is nothing in the principles which underlie such an action, or the rules of law applicable to it, that will justify their application to the claim of a mother to recover for the alienation of the affection of a minor child, where it is not alleged that she was deprived of the services, companionship, care, or custody of the child.

We conclude the demurrer was properly sustained, and the judgment is affirmed.[15]

DE GRAFF, C. J., and STEVENS and FAVILLE, JJ., concur.

15 See notes in 40 Harv. L. Rev. 771, 27 Col. L. Rev. 604, and 49 A. L. R. 562. A parent may recover for the sale to his infant child, by the defendant, of a habit forming drug. Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 247, 3 A. L. R. 1145 (1919).

DONAHOE v. RICHARDS et al.

Supreme Judicial Court of Maine, 1854. 38 Me. 376.

Case against the superintending school committee of the town of Ellsworth, for expelling a minor child of the plaintiff from a district school in that town.

The writ contained three counts. The first count alleged that the act was done maliciously; the second alleged the act to be done wrongfully and unjustifiably; and the third set forth the particular facts in regard to the requirement made of the plaintiff's child to read from the Protestant version of the Scriptures, her declining to do so from conscientious scruples, and that the defendants wrongfully and unjustifiably expelled her from the school, and refused to allow her to return only on condition that she should read from that version.

When the cause came on for trial, the counsel for plaintiff said that he relied, in support of the action, upon the following facts, which he proposed to prove:

On November 14, 1853, and a long time before and at the time of trial, the plaintiff was a resident with his family in Ellsworth, and entitled to have his children educated at a public school in that town; that Bridget, his daughter, aged 15 years, has ever resided with him, and on the 14th of November, aforesaid, was a scholar in the district school in said town; that, prior to November, aforesaid, the defendants being the superintending school committee of Ellsworth, had directed that the English Protestant version of the Bible should be used in all the public schools of that town, and that all the scholars in the schools, who were of sufficient capacity to read therein, should be required to read that version in school; that the plaintiff's daughter, Bridget, attending the school in the district where her father lived, from conscientious religious scruples, refused to read that version, but was willing to read instead the "Douay" version; that Bridget and her father both regarded it sinful to read the required translation, and both have been so instructed by the authorities of the Roman Catholic Church, of which they were members; that the defendants, on said November 14, as such committee, directed Bridget to leave the school, and not to return to it, until she would consent to read the said Protestant version, and thus expelled her from said school; and that the plaintiff had been obliged to employ a teacher at his own expense.

It was thought expedient that the questions of law arising in the case should first be settled, and the presiding judge ordered a nonsuit with the consent of plaintiff's counsel, it being agreed that, if in the opinion of the full court, the facts stated would support the action, then the nonsuit was to be taken off, and the case stand for trial; otherwise the nonsuit should be confirmed.

APPELTON, J. This suit is brought by the plaintiff, father of Bridget Donahoe, against the defendants, the superintending school

committee of the town of Ellsworth, for expelling her from school for a refusal to comply with the orders of her instructor, to read in the common version of the Bible, designated in the report as the Protestant version—such reading being a part of the general course of instruction, and this version being directed to be used in such course. The question presented is whether the father, if such expulsion were wrongful, has thereby received any such injury as will entitle him to pecuniary compensation.

A minor child is subject to the commands of its father during minority, and the father is entitled to its services. Being entitled to such services, he can maintain an action for any wrongful act done to the child, by which it is disabled or made less able to render its due and accustomed service. The loss of service in such case is held to be the gist of the action. Hall v. Hollander, 4 Barn. & Cress. 660. This principle, however, has been so far extended as to enable the father, when the child is too young to render any service, to recover in case of bodily injury for the trouble and expense he may have incurred in the care and cure of such child. Dennis v. Clark, 2 Cush. (Mass.) 347, 48 Am. Dec. 671. But in such case he cannot recover for the injury done to his parental feelings, or for the pain and suffering, or the circumstances of insult and aggravation with which the infliction of the injury may have been attended. Flemington v. Smithers, 2 C. & P. 292; Whitney v. Hitchcock, 4 Denio (N. Y.), 461. For injury to the person, the reputation, or the property, the suit must be in the name of the child, and the damages be awarded in accordance with the circumstances which may have accompanied and aggravated the wrong.

In this case, there is no act done, by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her, and, if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone; and, if her rights have been violated, she alone is entitled to compensation.

The claim of a plaintiff, under circumstances like those in the present case, has heretofore been examined and determined by courts entitled to the highest consideration, and with an entire uniformity of result. In Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53, it was held that the teacher of a town school was not liable to any action by a parent for refusing to instruct his children; there being no privity of contract between them. In Sherman v. Charlestown, 8 Cush. (Mass.) 161, Shaw, C. J., referring to the case just cited, remarks that the court were of opinion, among other reasons, that the action was misconceived, "because the father is not the person injured and entitled to recover damage in his own right." In Stephenson v. Hall et al., 14 Barb. (N. Y.) 222, it was held that an action will not lie in behalf of a parent against the town superintendents of public schools for expelling and excluding the plaintiff's minor child from the common school; nor for damages sustained by the parent in bringing an appeal to the state super-

intendent of common schools to get such child reinstated in the school. In this case, after a very careful and elaborate examination of all the authorities bearing upon the question, Allen, J., says: "I have searched in vain for a precedent sustaining an action of this character. I believe it is the first attempt of the kind that has been made in our courts of justice." In no case can a parent sustain an action for any wrong done to the child, unless he has incurred some direct pecuniary injury therefrom in consequence of some loss of service or expenses necessarily consequent thereupon. Upon principle as well as authority, the action cannot be maintained. Nonsuit affirmed.[16]

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

IRWIN v. DEARMAN.

Court of King's Bench, 1809. 11 East, 23.

This was an action on the case for damages, charged in one count to be for debauching and getting with child the adopted daughter and servant of the plaintiff, by which he lost her service; and, in another count, for debauching his servant, generally, per quod, etc.; and, the defendant having suffered judgment by default, a writ of inquiry was executed before the sheriff of Middlesex, when it appeared in evidence that the plaintiff, an officer in the army, had taken charge of the infant daughter of a deceased soldier in the regiment, who had been a friend and comrade of his, which daughter he had bred up for several years in his house, where she was performing the offices of a menial servant (being the only one he kept) at the time she was debauched by the defendant. The only actual damage proved by the plaintiff was the loss of the young woman's service for 5 weeks, during the time of her absence in the parish workhouse, where she lay in; the expense of her lying-in having been paid by the defendant. But the jury under these circumstances gave £100 damages.

Abbott now moved to set aside the inquisition of damages, as being greatly excessive, with respect to the general count; and having no legal foundation, with respect to the count charging in aggravation that the servant was the plaintiff's adopted daughter. The allowing of an action of this description even by a legitimate parent is an anomalous case; as enabling one person to recover damages for an injury done to another; but, having been so long countenanced by the courts in practice, it cannot now perhaps be questioned upon principle. And the extension of the remedy, in Edmondson v. Machell, 2 Term Rep. 4, to an action by an aunt with whom the niece was living, was very much doubted at the time; and the case ultimately ended in a compromise. At least that cannot be called into precedent for a further extension of the prin-

[16] Accord: Sorrels v. Matthews, 129 Ga. 319, 58 S. E. 819, 13 L. R. A. (N. S.) 357, 12 Ann. Cas. 404 (1907).

ciple to the case of one who is no relation at all, but only, as the count states, by adoption, which is not recognized by our law.

LORD ELLENBOROUGH, C. J. This has always been considered as an action sui generis, where a person standing in the relation of a parent, or in loco parentis, is permitted to recover damages for an injury of this nature ultra the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of Edmondson v. Machell, to extend to an aunt, as one standing in loco parentis, I think that this plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.[17]

PER CURIAM. Rule refused.

KELLY v. ILLINOIS CENT. R. CO.

Court of Appeals of Kentucky, 1907. 125 Ky. 1, 100 S. W. 239, 30 Ky. Law Rep. 1062.

LASSING, J. Ernest Kelly, a negro boy, 16 or more years of age, was injured while employed as a switchman in the yards of appellee company at Princeton, Ky. Appellant, Ira Kelly, filed suit against appellee in the Caldwell circuit court, seeking to recover damages for the loss of service and expenses incurred in nursing Ernest Kelly after his injury. He alleged that Ernest Kelly was his son, that he was wrongfully employed by appellant in a dangerous and hazardous work, and that by the negligence of appellee while so employed he was seriously and permanently injured. Appellee answered, traversing all of the material allegations of the petition, and thereupon appellant filed an amended petition, in which he stated that Ernest Kelly was not his son, but that he (appellant) stood in loco parentis to him. To this petition as amended appellee demurred, the demurrer was sustained, appellant declined to plead further, and his petition was dismissed. Because of this ruling on the part of the trial court, he prosecutes this appeal.

The question for determination is: Does the petition state a cause of action? There is nothing in the record showing that Ernest Kelly is in any way related to appellant. He alleges that he is not the father of the boy, but that he stands in loco parentis to him. It is not alleged that appellant ever adopted the boy, as he might have done by complying with the requirements of sections 2071 and 2072 of the

17 Accord: Ingersoll v. Jones, 5 Barb. (N. Y.) 661 (1849).

Kentucky Statutes of 1903. Nor is it shown that he ever qualified as guardian. His right, therefore, to bring this suit, rests solely upon the fact that he took Ernest Kelly into his home when he was a very small boy, and has kept him there since. Did this fact impose upon appellant any legal obligation to continue to maintain and support Ernest Kelly? Or, was Ernest Kelly under any legal obligation to continue to remain with and give his services to appellant? Or, had he desired at any time to leave the home and service of appellant, could appellant, by any process of law, have compelled him to return to his home and continue in his service? The answer to these two questions must determine appellant's right to prosecute this suit. If he was under any legal obligation or responsibility to support the boy, or the boy was under any legal obligation to remain with and continue to render service to appellant, then appellant would certainly have the right to recover such damages as he has sustained because of his being deprived of this service. And, on the other hand, if he was not entitled in law to compel the boy to continue to render service to him and remain with him during his minority, then he is not entitled to maintain this suit. The right to recover for loss of service is based primarily and solely upon the right of the complainant to receive this service. This court has held, in a number of cases, that the father may recover for the loss of service of his child, and that, if the father be dead, the guardian may recover therefor, and that, if there be no guardian, then the mother may recover. But we have been unable to find any authority which would authorize one occupying a position similar to that occupied by appellant in this case to prosecute a suit for loss of service. He might, with propriety, have instituted a suit as next friend, but this would not have been for loss of service, but for the personal injury to the boy, and the recovery would be for the benefit of the boy, and not for the benefit of appellant. The relationship existing between appellant and the boy was not such as imposed any legal duty or obligation upon either to continue that relationship. It is true that the boy may have been under a moral obligation or duty to render to appellant service as a reward for the kindness extended to him in his earlier life; but this duty, if he owed such, was not one which appellant could have enforced.

We are therefore of opinion that appellant failed to show that he had a right to maintain this suit, and the judgment is affirmed.[18]

[18] See Meisner v. U. S. (D. C.) 295 F. 866 (1924), where an adult, who had come to live with a farmer, working without pay, was held to be a member of the family, so that he could, under the statute, make his war risk insurance payable to the farmer's daughter.

STEPCHILDREN.—If a stepfather has taken his stepchild into his home, and the relation of master and servant exists between them, the stepfather can recover, just as a parent could, for an injury to the child. Eickhoff v. Sedalia W. & S. W. R. Co., 106 Mo. App. 541, 80 S. W. 966 (1904); Wessel v. Gerken, 36 Misc. Rep. 221, 73 N. Y. S. 192 (1901). A stepfather cannot recover for the board of a stepchild in his home, nor (semble) can the stepchild recover for services to his stepfather, in the absence of an agreement for such compensa-

HARRIS IRBY COTTON CO. v. DUNCAN.[19]

Supreme Court of Oklahoma, 1915. 57 Okl. 761, 157 P. 746.

Action by Will Duncan, by his next friend L. A. Wiseman, against the Harris Irby Cotton Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McKEOWN, C. The plaintiff, Will Duncan, by his next friend, L. A. Wiseman, commenced this action in the superior court of Oklahoma county against the plaintiff in error, Harris Irby Cotton Company, to recover damages for injuries sustained to his right hand in a gin owned and operated by the plaintiff in error, located at Geary, Okl. [At the time of his injury the plaintiff was sixteen years old.] The cause was tried to a jury upon the issues as joined, and upon a verdict and judgment in favor of the plaintiff the defendant appealed to this court. The parties will be referred to in the opinion as plaintiff and defendant as they appeared in the court below. * * *

Error is urged in the giving of instruction No. 18:

"You are instructed that, although the parents of a minor are entitled to the earnings of the minor until he becomes 21 years of age, still the father may emancipate the child by surrendering to him his rights whereby the father allows the child to receive for himself his earnings and forces the child to make his own living and allows him to contract for his services, and collect and use his own earnings, leaving the minor to act on his own responsibility with the same independence as though he had attained the age of 21 years. You are therefore to determine from the evidence whether or not the plaintiff had been emancipated prior to the time of the injuries alleged by him. If you believe from the evidence that the plaintiff's father prior to said time agreed with the plaintiff that the plaintiff should seek employment, contract for his services, and receive pay therefor, earning his own living and keeping all money earned by him free from the authority and control of his father, then you will find that the plaintiff in this case was emancipated."

It was incumbent upon the plaintiff to allege and to prove at the trial that he had been emancipated by his father. The plaintiff did this by testimony which was not contradicted by the defendant. The defendant urges that the emancipation as proven by the plaintiff was revocable by

tion. Smith v. Rogers, 24 Kan. 140, 36 Am. Rep. 254 (1880). But in Freto v. Brown, 4 Mass. 675 (1808), it was held that a stepfather could not recover the wages earned by his stepchild while working for a third person, unless the stepchild consented. The court there said that the stepfather could charge his stepchild for necessaries, but see Livingston v. Hammond, 162 Mass. 375, 38 N. E. 968 (1894).

[19] The troublesome problem of "emancipation," and its effects upon the relation of parent and child, will be specifically considered in this case and the next four cases. It has, of course, already been met with in the cases of Armstrong v. McDonald, 10 Barb. 300 (1851) supra, p. 66, McCloskey v. Cyphert, 27 Pa. 220 (1856) supra, p. 67, and Hall v. Hall, supra, 44 N. H. 293 (1862) p. 69.

the father at any time before majority. It seems to be well settled that the emancipation may be for the whole of minority or for a shorter time, gratuitous or for a valuable consideration, and requires the assent of the child. Counsel for the defendant are correct in their claim that when emancipation is by parole, without consideration, it may be revoked, but in this connection it is also true that, like a gift or license without consideration may be revoked before it is accepted, so emancipation may be revoked before assented to and acted upon by the child, and where the child has accepted the emancipation and acted upon the same, there is no more reason to permit the parent to revoke the emancipation of the child than to permit a donor to revoke a gift which has been accepted, unless where the welfare of the child would demand the revocation for the child's own good. It would appear that if the father permits the child to leave home, though not driven out by force or command, but by the in-coming of a stepmother, and thereby it becomes necessary for a child to make his own way, and is afterwards written to by the father to do the best he can, and when injured the child writes the father and fails to receive any answer or assistance, it would indeed be a harsh and unnatural rule of law that would permit the father to appropriate the earnings of the child and sue for the loss of his earnings to his majority, because, forsooth, he might have the power to revoke the emancipation of the child. To announce such a doctrine in this state, which has taken such forward strides in the protection of children, would be to re-enact the ancient Roman law, which held children to be the property of the father, placing them in their relation to him in "the category of things instead of that of persons." No issue was raised or evidence offered that there had been a revocation by the father at any time prior to the trial, or any intimation that there would ever be a revocation at some future time. A mere possibility is not sufficient, of itself, to defeat the lad's right to recover on his own behalf, and we are of the opinion that the question was fairly submitted to the jury in the court's charge.
* * *

PER CURIAM. Adopted in whole.[20]

[20] But see Louisville & N. R. Co. v. Bryant, 200 Ky. 177, 252 S. W. 145 (1923). If the father drives his child from home, or deserts his family, the father cannot collect the child's earnings. The Etna, 1 Ware, 474, Fed. Cas. No. 4,542 (1838); Swift & Co. v. Johnson, 138 F. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161 (1905); Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098 (1906); Clay v. Shirley, 65 N. H. 644, 23 A. 521 (1874); Patek v. Plankinton Packing Co., 179 Wis. 442, 190 N. W. 920 (1922).

Farrell v. Farrell, 3 Houst. (Del.) 633 (1867), contains a good discussion of the different kinds of emancipation. If the emancipation is by consent, express or implied, the child has the right to his earnings, and the consent cannot be revoked, at least as to wages already earned. Briggs v. St. Louis, Iron Mountain & Southern Ry. Co., 91 Ark. 122, 120 S. W. 970 (1909); Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73 (1827); Torrens v. Campbell, 74 Pa. 470 (1873).

In Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S. W. 956, 134 Am. St. Rep. 482, 19 Ann. Cas. 326 (1909), it is held that an emancipation acted upon by the child cannot be revoked if "it would be hurtful to the best interest of the child to interfere with his individual aims and plans."

The case last cited discusses quite fully the whole question of emancipation.

BELL, C. J., in HALL v. HALL[21] (Supreme Judicial Court of New Hampshire, 1862) 44 N. H. 293: "* * * The agreement to sell or give to a child his time, and to relinquish to him all right to his services or earnings, affords no foundation for the usual concluding portion of the published notices, in which the father declares that he will pay no debts of the child's contracting. As a notice that the father has revoked all power of the son to contract on his account, it may be valid, and any person who should contract with him, as an agent of his father, would do so at his peril, and the father generally would not be liable. But the duty imposed by law upon the father to maintain his minor child in case of his inability to maintain himself rests on considerations of public policy, looking to the protection of the community, and it cannot be renounced at his pleasure, nor the burden transferred to one who is not deemed in law generally competent to contract, nor capable of performing such a duty. Pidgin v. Cram, 8 N. H. 353; Hillsborough v. Deering, 4 N. H. 95; Jenness v. Emerson, 15 N. H. 488. * * *"[22]

LUFKIN v. HARVEY et al.

Supreme Court of Minnesota, 1915. 131 Minn. 238, 154 N. W. 1097, L. R. A. 1916B, 1111, Ann. Cas. 1917D, 583.

Action by H. M. Lufkin against W. J. Harvey and others. Verdict for defendants, and from an adverse order plaintiff appeals. Reversed, and new trial granted.

HALLAM, J. This case was before this court on a former appeal, 125 Minn. 458, 147 N. W. 444. The action was brought to charge defendants with liability for medical and surgical services furnished to a minor son. On the former trial, the trial court, trying the case without a jury, held that plaintiff had pleaded only an express contract, and that no express contract was proven, and on this ground decided the case for defendants. This court held that the complaint pleaded also an implied contract and that there was evidence of an implied contract, and remanded the case to be tried on all the evidence. The case was retried before the court and a jury. The jury found for defendants, and plaintiff appeals.

Plaintiff again relied upon an implied contract. The evidence from which it is claimed a promise of defendants to pay should be implied, is, in brief, that their son had been injured in the yards of the Union Depot

21 See p. 69, supra, where this case appears in full.

22 "But we do not understand * * * that the continuing liability of the father to support the minor is fatal to the minor's claim to control his own earnings. If it were otherwise, no emancipation by the father could ever be of any validity against his creditors, for it is clear that a father cannot, by his own act 'cast his son upon the public and relieve himself from the obligation of maintenance' imposed upon him by the pauper laws. See Gen. St., c. 74, § 8." Smith, J., in Johnson et al. v. Silsbee, 49 N. H. 543 (1870).

Company, where he was employed, and was taken to a hospital; that plaintiff was called by a friend and repaired to the hospital. An immediate operation was necessary. He performed this operation, and later a second operation, and continued to treat the son for a period of nine months, all with the knowledge and acquiescence of defendants. The necessary character of the services is admitted.

In general, parents are bound to supply a minor child with the necessaries of life. They may be held liable to pay for necessaries furnished by a third person to a minor child without their contract or consent where there is an omission of duty on their part to furnish necessaries, as where the need exists and the parents refuse or neglect to act; 29 Cyc. 1609 (6, 7); Brown & McCoy v. Deloach, 28 Ga. 486; Town of Farmington v. Jones, 36 N. H. 271; Tomkins v. Tomkins, 11 N. J. Eq. 512; Clinton v. Rowland, 24 Barb. (N. Y.) 634; or in case of some special exigency rendering the interference of the third person reasonable and proper, as in case of illness at a distance from the parental home; Keaton v. Davis, 18 Ga. 457; Porter v. Powell, 79 Iowa, 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 353. Where, however, the minor is provided for by his parents, there is no occasion for third persons to interfere, and in such case the parents are not liable for articles of the necessary class which a third person may furnish to their child, unless they agree to pay therefor. Such agreement may be implied from the existence of the parents' duty to provide for their child and their knowledge that a third person is furnishing necessaries with the expectation that they will pay therefor. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. It is on this ground that liability is claimed in this action.

2. Defendants seek to avoid liability on the ground that they had emancipated their son, claiming that they were for that reason not liable under any circumstances for necessaries furnished to him. It may be conceded that no implied contract could arise under the facts of this case unless there existed a duty on the part of the defendants to provide their son with necessaries. In other words, a contract would not be implied from the facts in this case if the son had been of full age; but if defendants were under obligation to provide their son with necessary surgical care, an obligation to pay might well arise from the facts in evidence.

The evidence as to emancipation on which defendants rely is as follows: The son was at the time of his injury about 18 years old. He was living at home with his parents. For about two years he had worked out, and for about one year had worked for the Union Depot Company. He secured that job himself, made his own contract, collected his own wages, kept or spent his own money as he pleased, and paid for his board at home.

Under the English common law, emancipation of children by their parents as we now understand the term was quite unknown. Schouler, Dom. Rel. (5th Ed.) § 267; Rex v. Roach, 6 T. R. 247; King v. In-

habitants of Wilmington, 5 B. & Ald. 525. In the United States the doctrine of emancipation has been applied with some liberality. Emancipation is not, however, to be presumed. It must be proved. Inhabitants of Sumner v. Inhabitants of Sebec, 3 Greenl. (Me.) 223; Lisbon v. Lyman, 49 N. H. 553. A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. Clay v. Shirley, 65 N. H. 644, 23 A. 521. There may be complete emancipation even though the minor continues to reside with his parents. 29 Cyc. 1674; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Donegan v. Davis, 66 Ala. 362; Dierker v. Hess, 54 Mo. 246, 250; McCloskey v. Cyphert, 27 Pa. 220; Beaver v. Bare, 104 Pa. 58, 62, 49 Am. Rep. 567.

Complete emancipation gives to the minor his time and earnings and gives up the parents' custody and control, and in fact works an absolute destruction of the filial relation. Lowell v. Newport, 66 Me. 78. Emancipation may, however, be partial. A minor may be emancipated for some purposes and not for others. The parent may authorize his minor child to make contracts of employment and collect and spend the money earned and still not emancipate him from parental custody and control. Porter v. Powell, 79 Iowa, 151, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 353; Hunycutt & Co. v. Thompson, 159 N. C. 29, 74 S. E. 628, 40 L. R. A. (N. S.) 488, Ann. Cas. 1913E, 928.

There is some authority for the proposition that complete emancipation of a minor relieves the parent of all duty of support, and that the mutual rights and obligations of parent and child are then the same as though the child were of lawful age. Schouler, Dom. Rel. (5th Ed.) § 268. We are not confronted with that question here, since we consider the evidence insufficient to show a complete emancipation. It shows no more than an assent on the part of the parents that the boy should hire out and collect and spend what he earned. Complete emancipation cannot be inferred from these facts alone. Dunks v. Grey (C. C.) 3 F. 862; Searsmont v. Thorndike, 77 Me. 504, 1 A. 448; Nicolaus v. Snyder, 56 Neb. 531, 76 N. W. 1083.

Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763, is cited as establishing a contrary rule. We do not think that decision can be so construed. In that case a widowed mother conducted a tanning and fur dyeing business. She employed a minor son to work for her in the factory for the stipulated compensation of $6 a week and board and lodging in her home. It was held that the evidence was sufficient to justify submission to the jury of the question whether she freed him from her parental custody and control. The opinion in the case does not purport to state all the evidence upon which the finding of emancipation was sustained. The record contains some showing that the mother not only gave her son his earnings, but that she told him that he might go to work and "take care of himself," and do what he wanted to, and that he assented thereto.

When we consider that complete emancipation involves an absolute destruction of the filial relation, it is quite clear that it should not be inferred from the fact alone that the parent gives the child the right to hire out and collect and disburse his earnings. It is matter of common knowledge that, in very many, if not in most, cases where such right is given to minor children living at home there is no thought of destruction of the filial relation.

We think a gift to the son of his wages has about the same bearing upon the liability of the parent for necessaries that a gift of any other money would have. If it is sufficient to supply the son with all necessaries, he may not pledge his parents' credit and the parents are not chargeable therewith. If it is not sufficient, the parents remain liable for any necessaries which the wages are not sufficient to supply. This is the substance of the rule of many cases where recovery has been sustained against a parent for necessaries furnished to a minor child, notwithstanding such minor has been given his earnings. Porter v. Powell, 79 Iowa, 151, 155, 44 N. W. 295; Cooper v. McNamara, 92 Iowa, 243, 60 N. W. 522; De Wane v. Hansow, 56 Ill. App. 575; Hunycutt v. Thompson, 159 N. C. 29, 74 S. E. 628, 40 L. R. A. (N. S.) 488, Ann. Cas. 1913E, 928. See, also, Swain v. Tyler, 26 Vt. 9. We have not attempted to harmonize all the cases bearing upon this question. Some contain language not consistent with this decision. Giovagnioli v. Fort Orange Construction Co., 148 App. Div. 489, 133 N. Y. S. 92; Johnson v. Gibson, 4 E. D. Smith (N. Y.) 231. Some even hold that a parent is under no obligation to support his minor children. Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Raymond v. Loyl, 10 Barb. (N. Y.) 483; Gordon v. Potter, 17 Vt. 348. The principles we have stated appear to us just, and are, we believe, well sustained by authority.

Our conclusion is that there is ample evidence of an implied contract on the part of these defendants to pay for plaintiff's services, and that the defense of emancipation is not made out. We do not consider the case one where we can order judgment for the plaintiff notwithstanding the verdict, and a new trial must be granted. * * *

Order reversed, and new trial granted.

IROQUOIS IRON CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 294 Ill. 106, 128 N. E. 289, 12 A. L. R. 924.

Proceedings under the Workmen's Compensation Act by Raymond P. Olesen, administrator, for compensation for death of Peter W. Olesen, the employé, opposed by the Iroquois Iron Company, the employer. Compensation was awarded, the award confirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

THOMPSON, J. October 14, 1918, Peter W. Olesen was killed while in the employ of the Iroquois Iron Company, plaintiff in error. He left surviving him Mary Olesen, who obtained a divorce from him in 1914 on the ground of habitual drunkenness, Raymond P. Olesen, 22 years old, and Reginald W. Olesen, 20 years old. The elder son, as administrator of his father's estate, filed his application for compensation before the Industrial Commission, naming the widow as the beneficiary. At the hearing before the arbitrator the petition was amended, making the younger son the beneficiary. The arbitrator found that no amount was payable under paragraphs (a), (b), (c), or (d), of section 7 of the Compensation Act (Laws 1913, p. 335), and awarded the sum of $150 for burial expenses in accordance with paragraph (e) of that section. On the hearing on review the finding of the arbitrator was reversed, and the Industrial Commission found "that the deceased left him surviving a son, Reginald W. Olesen, whom the deceased was under legal obligation to support," and awarded to the applicant $3,500 compensation in accordance with paragraph (a) of section 7 of the act. On certiorari this decision of the Industrial Commission was confirmed by the circuit court of Cook county, and this court has granted leave to prosecute this writ of error to review that judgment.

The only question presented for review is whether deceased was "under legal obligation to support" his son Reginald at the time of the injury which resulted in his death. When Mrs. Olesen obtained her divorce she was awarded the sole care, custody, and education of the children, and deceased was ordered to contribute and pay $5 each week toward the support of Reginald, who was then 15 years of age. Both the sons lived with the mother for a short time, and then Reginald went to live with his father. They roomed together, the father paying the room rent. During the summer of 1915 Reginald was employed at Field's. He kept all the money he earned and fully provided for himself. October 3, 1915, he enlisted with the United States marines for a period of four years. This enlistment was without the knowledge of the mother, but was with the father's consent. Deceased and the elder brother in June, 1918, each sent $30 to Reginald, who was stationed in Florida, to pay his fare home on a furlough. At another time they sent him $45 to defray the expenses of a civilian physician when Reginald had his eye injured in the service. According to Reginald's testimony, his father sent him $10 a month in currency, but he had no letters or receipts covering the amounts, because, as he said, they were required to burn such things during the "flu" epidemic. His pay was $14.80 a month while he was a private. October 4, 1917, he was made a corporal, and his pay was increased to $36. A month later he was advanced to the rank of sergeant at $38 a month. The government furnished him his meals, clothing, and living quarters. The only things it was necessary for him to purchase were toilet articles, such as tooth paste and soap. If he wanted extra food, his uniform pressed, or other

extras not included in the army list, he was required to pay for these items with his own funds.

It seems too clear to require argument that Reginald Olesen was not dependent upon his father for support, but the question of dependency is not controlling here. The question we are called upon to determine is whether the deceased was under legal obligation to support this son at the time of the injury. This question is not only new in this state, but seems to be one that has not had the attention of courts of last resort of other states that have been called upon to construe Workmen's Compensation Acts. Generally speaking, when a child arrives at the age of majority the parent is no longer under legal obligation to support him. On the other hand, the parent is usually under a legal obligation to support his minor children. When a child who is physically and mentally able to take care of himself voluntarily abandons the parental roof and leaves its protection and influence and goes out to fight the battle of life on his own account, the parent is no longer under legal obligation to support him. Hunt v. Thompson, 3 Scam. 179, 36 Am. Dec. 538. If a boy has attained an age at which he is capable of supporting himself, neither justice, reason, nor the law requires the parent to maintain him in idleness. Emancipation is inferred where the child contracts for his services and collects and uses his own earnings. Scott v. White, 71 Ill. 287; 20 R. C. L. 610; 29 Cyc. 1675. When a minor enlists in the military service of this country, he ceases to be a part of his father's family, and puts himself under the control of the government, and is consequently emancipated so long as this service continues. 21 Am. & Eng. Ency. of Law (2d Ed.) 1060; Com. v. Marris, 1 Phila. 381; Baker v. Baker, 41 Vt. 55; Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579. Enlistment is a contract between the soldier and the government, which involves a change in his status, which cannot be thrown off by him at his will. In re Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636. Emancipation works a severance of the filial relation as completely as if the child were of age. Whether there has been an emancipation is a question of fact, but what is emancipation is a question of law. The facts in this case are undisputed, and whether or not the deceased, in view of the undisputed facts in this record was under legal liability to support his son who had enlisted in the military service, is a question of law which this court must determine. Reginald Olesen was born July 21, 1898, and therefore would arrive at his majority before his term of enlistment expired. The emancipation of this son was brought about by the voluntary act of the parent and the child, and we think, both on authority and principle, it must be held that deceased was not under legal obligation to support his son at the time of the injury in question.

The judgment of the circuit court is therefore reversed, and the cause is remanded to the circuit court of Cook county, with directions to re-

mand the cause to the Industrial Commission, with directions to confirm the finding of the arbitrator.

Reversed and remanded, with directions.[23]

HOLLAND v. BEARD et al.

Supreme Court of Mississippi, 1881. 59 Miss. 161, 42 Am. Rep. 360.

COOPER, J., delivered the opinion of the court.

This is an action of debt upon the official bond of George Beard, as clerk of the circuit court of Grenada county, instituted by the appellant to recover damages for the unlawful issuance by said clerk of a marriage license authorizing the solemnization of a marriage between one C. A. Smith and the daughter of the appellant, he not having given his consent thereto and his daughter being under the age of eighteen years. By the Code of 1871, § 1760, clerks of the circuit courts are authorized to issue marriage licenses. But if the male intending to marry be under the age of twenty years, or the female be under the age of eighteen years, it is made the duty of the clerk, before granting the license, to require certain evidence of the consent of the parent to the marriage; and, if in default of such evidence he shall issue the license, he is liable to a penalty of one thousand dollars, to be recovered by any one who shall sue therefor. By the act of 1875 (Acts 1875, p. 122) it is provided that the clerk may require an affidavit to be made by the applicant for the license, or by some credible person other than the applicant, that the parties are of the prescribed age, and thereupon the clerk is protected, unless he has actual notice that they are not of proper age. It is admitted by the appellees that the clerk failed to require any evidence of the appellant's consent to the marriage, or of the age of the daughter; and the evidence introduced shows that she was under the age of eighteen years, and that she married without the consent of her father.[24]

It is unnecessary to consider the testimony as to the value of the services of the daughter, between the time when she left her home and that at which she was married, for the appellees are not complained against for enticing away the daughter. The only allegation of wrong is that the license was illegally issued, and the license, it is clear, per-

[23] See the note to this case, 12 A. L. R. 927. In Peters v. Industrial Commission et al., 314 Ill. 560, 145 N. E. 629 (1924), the father of a son who was discharged from the military service at the age of about nineteen, and who then returned to his father, who supported him for several months before the father died, was held to be under "legal obligation to support" the son, within the meaning of the statute in question in the principal case.

See a note in 20 Ill. L. Rev. 85, for the view that emancipation never relieves a father of the obligation to support his minor child.

[24] In the case of George Beard v. Richard Holland, 59 Miss. 164 (1881), the statutory penalty of $1,000 was recovered. The action in the principal case was for damages, and not for the penalty.

formed no function until the very moment of the marriage. The single question therefore presented is whether a father can recover damages against one who actively participates in bringing about a marriage of his child who is under the age of eighteen years, the father not consenting thereto. If the marriage itself is illegal because of the want of assent by the parent, then, the chain of parental authority remaining unbroken, the right of the father to the services of the child continues, and the action may be maintained. * * *

The right of the parent to the custody and services of his child, though it is said to arise from nature, and to be reciprocal to the duty of the parent to nurture and support the child during the years of tender infancy, is nevertheless dependent upon the laws of organized society for its protection and enforcement, and, since society will not compel the performance of obligations, which tend to its own subversion, it limits or destroys the natural rights of individuals which are not consistent with its welfare. The duty of the parent to provide for his child, and the corresponding duty of the child to submit to the control of the parent, are enforced, not because they are natural duties, but because their performance is conducive to the public good. When, therefore, the preservation or harmony of the social system requires the protection of other and antagonistic domestic relations, that of parent and child, in so far as it is the source of legal rights, is dissolved. From the moment of marriage the husband and wife assume towards each other duties in the performance of which society is vitally interested, and which it will not permit to be hampered or obstructed by the assertion of conflicting rights by others. It is immaterial that one or both of the contracting parties has impaired the rights of others by the marriage; the privileges and immunities of the relation are extended alike to the offending and the innocent, not because of tenderness toward the offender, but because a status has been assumed, which the public welfare requires shall not be disturbed. In White v. Henry, 24 Me. 531, it was held that a father might recover from an employer the wages of his minor son who had contracted marriage without his consent, and in State v. Baker, 47 Miss. 88, it was said "that the plaintiff may sue upon the official bond for the issuance of a license for the marriage of his daughter under eighteen years of age." The former case, we think, is clearly against the weight of authority, and in the latter this point was not involved, and the remark must be considered only as the suggestion of the judge who delivered the opinion, indulged in without an examination of the law such as he would have made if the question had been involved in the decision. An essential element in the marital relation is the right of the husband to the services and society of the wife, to the exclusion of all rights of the parent, and therefore a legal marriage is a legal emancipation from parental control. The damage which the appellant has sustained resulted from a legal act, the effect of which was to displace his right to the services of his daughter; the damage is therefor damnum absque injuria, and this action is not maintainable. Jones v. Tevis, 4

Litt. (Ky.) 25, 14 Am. Dec. 98; Hervey v. Moseley, 7 Gray (Mass.) 479, 66 Am. Dec. 515; Goodwin v. Thompson, 2 G. Greene (Iowa) 329; Cooley on Torts, 230, 237; Schouler on Domestic Relations, 355.

Judgment affirmed.[25]

[25] Accord: Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529 (1885); Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S. W. 66 (1907); Stanley v. Rasnick, 137 Va. 415, 119 S. E. 76 (1923).

An infant husband is under the same legal duty to support his wife and children, as an adult husband. His father is therefore deprived of his earnings, at least to the extent necessary to enable him to support his family. Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255 (1892); Cochran v. Cochran, 196 N. Y. 86, 89 N. E. 470, 24 L. R. A. (N. S.) 160, 17 Ann. Cas. 782 (1909). Contra: White v. Henry, 24 Me. 531, (1845); Austin v. Austin, 167 Mich. 164, 132 N. W. 495, Ann. Cas. 1913A, 545 (1911).

The marriage of an infant destroys the right of his parents to his custody. State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899). In Fisher v. Drew, 247 Mass. 178, 141 N. E. 875, 30 A. L. R. 798 (1924), an infant daughter married without her father's knowledge, and continued to live in his home for two years. It was held that the father could recover against her husband for her board.

But the marriage of an infant who has been committed to a public institution, Richardson v. Browning, 57 App. D. C. 186, 18 F.(2d) 1008 (1927), or who is a ward of a juvenile court, In re Hook, 95 Vt. 497, 115 A. 730, 19 A. L. R. 610 (1922), does not emancipate him from its parental control.

One in whose custody an infant has been placed by the state cannot emancipate him. Stanaback v. McFadden, 225 Mich. 452, 196 N. W. 526 (1923).

As to the effect of emancipation upon the power of an infant to acquire a domicile independent of that of his parents, see note in 5 A. L. R. at 949.

CHAPTER 4

LIABILITY OF PARENT FOR TORT OF CHILD

HAUNERT v. SPEIER et ux.

Court of Appeals of Kentucky, 1926. 214 Ky. 46, 281 S. W. 998.

Action by Eugene A. Haunert, by next friend, against Mr. and Mrs. Louis A. Speier. From a judgment of dismissal on demurrer to petition, plaintiff appeals. Affirmed.

DIETZMAN, J. A demurrer having been sustained to the petition of the appellant, who was the plaintiff below, and he having declined to plead further, his action was dismissed, and he brings this appeal.

Appellant, through his next friend, avers in his petition that he is under 21 years of age, but does not say how much under 21 he is. He further avers that the appellees have a minor son, but likewise does not say how much under 21 years of age this minor son is. He further states that on March 14, 1924, this minor son of the appellees assaulted him in the city of Dayton, Campbell county, Ky., and inflicted upon him very serious and painful injuries. He next says that this assault on him by this minor son—

"was done by the coercion, authority, instruction, and example of Mr. and Mrs. Louis A. Speier, they having knowledge that their son, Louis Speier, did on numerous occasions strike, beat, and throw rocks at different other boys and girls at the direction and with the approval and instruction of his parents, the said Mr. and Mrs. Louis A. Speier, and that they had full knowledge of their son's bad characteristics, ways, character, and habits, and that he was dangerous to society."

It is by reason of these averments in his petition that appellant seeks to fix upon the appellees the responsibility for the assault of their minor son upon him.

It is conceded that a parent is not responsible for the torts of his child simply because of the relationship of parent and child. Pauley's Guardian v. Draine, 6 S. W. 329, 9 Ky. Law Rep. 693; Holland v. Goode, 222 S. W. 950, 188 Ky. 525; 29 Cyc. 1665. An examination of the cases will disclose that, wherever the parent has been held responsible for the tort of his child, it has been either on the ground that the child, in committing the tort, has done so while acting as the agent or servant of his parent and the liability is put on principles of agency, or on the ground that the child is the conduit of the parents' negligence and the liability is put on the familiar principle of proximate cause. Cf. Stephens v. Stephens, 189 S. W. 1143, 172 Ky. 780. Measured by these rules, the petition of appellant was insufficient. It is familiar law that a pleading must be construed most strongly against the pleader.

Appellant's allegation that the assault was committed by the coercion, authority, instruction, and example of the appellees is explained by him to mean that, because appellees knew their son had on other occasions and under their direction assaulted other children, and because they knew their son had a mean temper, they therefore must be held to have authorized this particular assault herein complained of. Such a charge does not establish the relationship of principal and agent so far as this particular assault is concerned. It is not unambiguously alleged that the parents authorized this assault on the plaintiff. It is not claimed that the assault was committed to further any interest of appellees, or done by their son while performing some duty for them or in the scope of any agency being carried out by him for them. It is clear liability cannot be fastened upon appellees on the ground of agency.

So far as the son being the conduit of the appellees' negligence is concerned, it is not claimed that this son was insane or that he was not an intelligent human being, entirely responsible for his own acts. For aught that appears from the petition, he may have been just short of 21 years of age, and fully capable of exercising his own will, and entirely conscious of the probable consequences of any act he might do. It is not stated that the parents had any knowledge of the probable or impending conflict between appellant and their son, or that they did anything but permit him to run at large, knowing he had a mean temper. But, if appellees' son was an intelligent, responsible human being, possessed of sufficient discretion to appreciate the probable results of his own acts, the assault he is alleged to have committed is his assault and is not that of his parents. The proximate cause of the assault in such state of case is not any negligence on the part of a parent in permitting an irresponsible child to run at large under such circumstances as to constitute a menace to society, but is the independent act of a responsible human being, possessed of sufficient discretion to appreciate the probable consequences of the exercise of volition on his part and of the acts he does in consequence of such exercise of such volition. The parent is then not liable for any such act of his minor child. Stephens v. Stephens, supra.

Therefore, as appellant failed to state a cause of action on either ground of liability, the trial court properly sustained the demurrer to his petition, and its judgment is affirmed.[1]

1 Accord: Paulin v. Howser, 63 Ill. 312 (1872); Smith v. Davenport, 45 Kan. 423, 25 P. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737 (1891); Paul v. Hummel, 43 Mo. 119, 97 Am. Dec. 381 (1868); Tifft v. Tifft, 4 Denio (N. Y.) 175 (1847). But see note by John H. Wigmore, 19 Ill. L. Rev. 202.

The subject of the parent's liability for his own negligence in intrusting a dangerous instrumentality to a child who is incompetent to use it safely is not elaborated here, since he would be equally liable if the child were not his own, and the problem has nothing to do with the family relation. For a recent application of this doctrine, see Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738, 36 A. L. R. 1156 (1924), where the father was held liable for furnishing a fifteen year old son with a motorcycle to drive on the public highway in vio-

HOVERSON et al. v. NOKER et al.

Supreme Court of Wisconsin, 1884. 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381.

TAYLOR, J. The plaintiffs in this action are husband and wife, and the defendants are father and his two sons. The action was in the nature of an action on the case for an injury to the wife, caused, as alleged in the complaint, by the joint acts of the defendants. The evidence on the trial shows pretty clearly that, while the plaintiffs were passing along the highway with their team and wagon in front of the defendant's house on a Sunday, going to church, the two young sons of the defendant, Frank Noker, came out of their father's house and fired off a pistol and shouted, and so frightened the plaintiffs' horses that they jumped suddenly forward and threw Sarah Hoverson out of the seat and injured her; and in the afternoon, on their return from the church, the boys again fired the pistol and shouted and again frightened the plaintiffs' horses, but did not injure Mrs. Hoverson to as great an extent as in the morning. The jury, under the instructions of the court, found a special verdict, and assessed the plaintiff's damages at the sum of five dollars. From the judgment entered on such verdict Sarah Hoverson appeals to this court.

The case, though not involving any great amount of money, has been argued by counsel orally and in the submitted briefs with a degree of ability and care highly commendable. The learned counsel for the appellant presents several points upon the rulings of the court upon the trial rejecting evidence offered by him, for which he claims the judgment should be reversed. It will be seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent

lation of the statute. Compare, however, Hagerty v. Powers, 66 Cal. 368, 5 P. 622, 56 Am. Rep. 101 (1885).

The parent may, of course, be liable on the ground that the child is his agent. Some courts have held that a child or other member of the family driving the family automobile is the agent of the head of the family. The propriety of this conclusion is, of course, essentially a question of the law of agency. For the authorities, see notes, 32 A. L. R. 1506, 50 A. L. R. 1512, and references therein.

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permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon. * * *

Other exceptions to the rejection of evidence were taken, but it is unnecessary to consider them, as they will not be likely to occur upon a new trial.

The nonsuit in favor of the father upon the first cause of action stated in the complaint was, we think, improperly granted, even upon the evidence admitted by the court. There was at least some evidence admitted upon which the jury might have held the father liable for the acts done in the morning. On the case made by the plaintiffs, under the too strict rule held by the court as to the admission of evidence, there was still enough to carry the case to the jury upon both the causes of action stated in the complaint; at least, so far as the father was concerned.

The exceptions to the rulings as to the form of the special verdict need not be considered, as there must be a new trial for the errors above suggested. We deem it proper, however, to say that the judge, in his instructions upon the following question submitted to them, "Did the defendant Frank Noker direct his sons, the other two defendants, to make the noise they did when the plaintiffs were passing the house with their team?" fell into an error when he instructed them "that in order to answer this question in the affirmative they must be satisfied from the evidence that he by word so directed his sons to make the noise." This was too strict a limitation upon the subject. The evidence might have satisfied the jury that he directed the acts of his sons, but they might be unable to find evidence that he did so direct it by express words of command. Certainly no express command to do as they did was necessary to hold the father liable for their acts.

For the errors mentioned the judgment must be reversed. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CHAPTER 5

LIABILITY OF PARENT IN TORT TO CHILD[1]

MATARESE v. MATARESE.

Supreme Court of Rhode Island, 1925. 47 R. I. 131, 131 A. 198, 42 A. L. R. 1360.

Action by Lola Matarese, pro ami, against Amiello Matarese. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled, and case remitted for entry of judgment on verdict as directed.

SWEETLAND, C. J. This is an action of trespass on the case for negligence to recover damages for personal injuries alleged to have been suffered by the plaintiff by reason of the defendant's negligence in the operation of an automobile. The case was tried before a justice of the superior court sitting with a jury. At the close of the evidence the justice directed the jury to return a verdict for the defendant. The case is before us upon the plaintiff's exception to that direction of the justice.

From the transcript of evidence it appears that the defendant is the father of the plaintiff. At the time of the injury complained of the plaintiff was about five years old, and was a member of her father's household. Just before her injury she was playing on the sidewalk near her home and the defendant was approaching her driving an automobile. The defendant, at the request of the plaintiff, stopped, and then either invited or permitted the plaintiff to sit upon the running board of the machine to ride to their home. While she was in that position the defendant started the machine forward, the plaintiff was thrown to the ground, a rear wheel of the automobile passed over her leg, fracturing the bone and seriously injuring her. The justice directed a verdict for the defendant on the ground that the plaintiff could not maintain an action of this nature against her father.

Immemorially the family has been an important element of our civil society, one of the supports upon which our civilization has developed. Save as modified by the Legislature, in domestic affairs the family has remained in law a self-governing entity, under the discipline and direction of the father as its head. As part of the family order or arrangement are the related obligations and rights of the father and his minor

[1] A parent is criminally liable for violence to a child in excess of permissible punishment. Commonwealth v. Blaker, 1 Brewst. (Pa.) 311 (1867); State v. McDonie, 96 W. Va. 219, 123 S. E. 405, 37 A. L. R. 699 (1924).

child while the child remains in his household unemancipated. On the part of the father is the right and duty to control, protect, support, and to guide or educate the child. The reciprocal duty of the child is to serve and obey the father. These fundamental principles are traceable to ancient customs and usages, and are fixed by tradition and evidenced by the decisions of the courts. Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment, and is not to be countenanced save upon positive provisions of the statute law. Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law, and not to be sanctioned by the courts. Such conflict would arise by recognizing the right of a minor child to bring his personal action against the father to recover damages for torts alleged to have been committed by the father in the course of the family relation, and resulting in personal injury to the child. The state by criminal proceedings will punish the father for the gross abuse of his power of control and discipline resulting in injury. For his continued abuse or neglect, indicating that the restraint arising from parental affection has failed, the state will remove the child from the father's control. It is, however, inconsistent with the family relation, while it exists, to permit the maintenance of such an action as that at bar of a minor child against his father to recover damages for the alleged negligence of the father.

During the long and intimate family relation of a parent and his minor child, living in the household of the parent, it is extremely likely that circumstances may arise resulting in some injury to the child, which injury may be imputed to the negligence of the father because of the condition of the family dwelling, or the act of the parent himself or that of his servant or agent. To permit each of such acts of real or alleged negligence to be the basis of an action for damages against the father during the child's minority or upon his majority or against the father's estate upon the latter's death would destroy the harmony of the family and militate against the peace of society. That this principle has been recognized as expressing the common law is evidenced by the fact that no case of the action of a minor child against his father for tort appears either in the English reports or in any state report down to 1891, although during that period numerous cases appear of criminal proceedings against parents for the abuse of their minor children in circumstances which would permit civil actions for damages if such right of action existed.

In 1891 this question was presented to the Supreme Court of Mississippi in Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. The court held that a parent is not civilly liable to a child for personal injury inflicted during minority, and while the relation of parent and child, with its mutual obligations, exists, and that a sound public policy forbids to the child the right to assert such a claim in a suit at law. The decision in that case has been approved and followed in Mc-

Kelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 130; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135; Roller v. Roller, 37 Wash. 242, 79 P. 788, 68 L. R. A. 893, 107 Am. St. Rep. 805, 3 Ann. Cas. 1; Smith v. Smith (Ind. App.) 142 N. E. 128. In Roller v. Roller, supra, the action was that of a minor daughter against her father to recover damages for rape committed upon her, for which crime the father had been convicted and imprisoned. Notwithstanding the heinous nature of the wrong, the court held that no line of demarkation between torts can be drawn, and to permit an action in any circumstances would be to encourage the disturbing conditions which would be introduced if parents and children were allowed to be involved in litigation of this kind. From the facts in that case it might be urged with apparent reason that the father by his wicked act had destroyed the family relation, had invaded the absolute rights of the child, and had emancipated her. While we approve the general rule enunciated in that case, it is unnecessary here to consider its application in such extreme circumstances as are there presented.

The plaintiff criticizes the opinions in the cases supra for the reason that the courts base their conclusions, denying the right of action, on what they declare to be a "rule of the common law." Following the argument contained in the elaborate dissenting opinion filed in Small v. Morrison, supra, the plaintiff asserts that, in the absence of decisions upon the question extending back to the early reports, the courts in the cases cited supra have evolved the rule denying the right of action from their own consciousness, and have then erroneously designated it as a rule of the common law. The objection is not sound. The common law is found in the principles derived from the usages, customs, and manners of the people. The decisions of the courts and the writings of learned commentators do not create the common law; they merely evidence the deductions which may properly be drawn from an examination of its sources. The conclusions to which the plaintiff objects are readily deduced from those principles of the common law which are involved in the structure of our society as it has existed since antiquity.

In support of her contention the plaintiff cites Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112; Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961; Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133; and Fidelity v. Marchand, Can. L. Rep. (1924) 86. In the first of these cases the court seems to have erroneously applied to a civil action for damages instituted by a child, without noting the distinction, the principles recognized and applicable in criminal proceedings prosecuted by the state. Each of the two cases following was brought to recover damages against a person who was not a parent in blood of the plaintiff, and who does not clearly appear to have stood in loco parentis to the plaintiff. The last case cited by the plaintiff is not in point. It is based upon a statute of the province of Quebec which the

court construed as permitting the action in question. None of these cases cited by the plaintiff appears to us to lessen the authority of the cases supra in which the right of action has been denied.

The plaintiff's exception is overruled. The case is remitted to the superior court for the entry of judgment on the verdict as directed.[2]

[2] Accord: Elias v. Collins, 237 Mich. 175, 211 N. W. 88, 52 A. L. R. 1118 (1926); Ciani v. Ciani, 127 Misc. Rep. 304, 215 N. Y. S. 767 (1926); Wick v. Wick, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927), with a dissenting opinion.

It seems that a fully emancipated minor can sue his parent for a tort. Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763 (1908).

CHAPTER 6

ADOPTION

In re THORNE'S ESTATE.

BRANTINGHAM v. HUFF.

Court of Appeals of New York, 1898. 155 N. Y. 140, 49 N. E. 661.

In the matter of the probate of the will of Joseph Thorne, deceased. May Thorne Brantingham appeals from an order of the appellate division (48 N. Y. S. 1116) affirming an order of the surrogate's court, dismissing her petition for leave to intervene and file objections to the probate of said will. Affirmed.

BARTLETT, J. The petitioner, May Thorne Brantingham, the appellant, seeks to intervene in the matter of the probate of the will of Joseph Thorne, deceased, on the ground that she is his lawfully adopted child, and interested in the distribution of his estate. It is found by the surrogate's court of Westchester county that on the 21st day of December, 1863, at the city of New York, Joseph Thorne, and Elizabeth, his wife, attempted to adopt the petitioner when she was one year and eleven months old (her father being dead), with the consent of her mother and the superintendent of the out-door poor, acting on behalf of the commissioners of public charities and correction of the city of New York. This act of attempted adoption is established by the production of a written indenture or agreement duly executed, to continue until the infant attained the age of 18 years. It is further found that, in pursuance of this agreement, the petitioner became a member of the household of Joseph Thorne and Elizabeth, his wife, and that they maintained the relation of foster parents towards her down to the time of their death, in the year 1897. These findings were followed by the legal conclusion that the relation of adopted child and foster parents was not established by this agreement, for the reason that, at the time of its execution, there was no statute in this state authorizing such an adoption. The petition was dismissed. The appellate division affirmed the order of the surrogate's court.

The adoption of children and strangers to the blood was known to the Athenians and Spartans, the Romans and ancient Germans. This subject is discussed by many writers. The provisions of the Roman law, as modified by Justinian, were transmitted to the modern nations of Europe, and appear in the Code Civil of France and in the Spanish law. 31 Cent. Law J. 66. This form of domestic relation was however, unknown to the common law of England, and exists in this country only by virtue of statute. Morrison v. Sessions' Estate, 70 Mich. 297–305, 38 N. W. 249; Ballard v. Ward, 89 Pa. St. 358; Abney v. De

Loach, 84 Ala. 393, 4 So. 757; Carroll v. Collins, 6 App. Div. 106, 40 N. Y. S. 54. The first general statutory provision in this state is contained in Laws 1873, c. 830, entitled "An act to legalize the adoption of minor children by adult persons." This act, after providing for adoption in detail, contains in its last section this saving clause: "Nothing herein contained shall prevent proof of the adoption of any child, heretofore made according to any method practiced in this state, from being received in evidence, nor such an adoption from having the effect of an adoption hereunder." The tenth section of the act provides that the child should have all the rights and be subject to all the duties of the relation of parent and child, except the rights of inheritance. Subsequently, this section, by Laws 1887, c. 703, was amended so as to confer the rights of inheritance. These statutory provisions remained in force until the enactment of the domestic relations law (Laws 1896, c. 272, §§ 60–68). These, in brief, are the general statutory provisions in this state in the matter of adopting minor children, and it is obvious that the attempted adoption of the petitioner, in 1863, was without legal sanction, unless it be true, as is contended by counsel for the appellant, that the saving clause already quoted from the act of 1873 was intended to legalize all private agreements for adoption previously executed. While there has been some diversity of opinion in the lower courts as to the precise meaning of this clause, we think the only construction permissible is that it refers to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charters of charitable societies that received destitute and homeless children, and whose officers were permitted to execute agreements of adoption on their behalf with suitable persons willing to assume the obligations of parents. This is illustrated by the act to incorporate the American Female Guardian Society, a well-known charitable institution in the city of New York. Laws 1849, c. 244. Section 6 of this act provides, in substance, that, where a child is surrendered to the management of the society, it shall be lawful for the board of managers, in their discretion, to place such child, by adoption or service, in some suitable employment, and with some proper person or persons. It is obvious that the legislature did not have in contemplation the legalizing of private agreements executed without authority of law, and containing no safeguards or restrictions of any kind as to the transmission of property. Any such construction of the saving clause in the act of 1873 might seriously affect the titles to real estate, and introduce many elements of danger. It follows that the agreement in this case, relied on to create the relation of foster parents and adopted child, worked no such result, and that the order appealed from should be affirmed, with costs. All concur, except GRAY, J., absent. Order affirmed.[1]

[1] Accord: Nichols v. Nichols (C. C. A.) 20 F.(2d) 474 (1927); Non-she-po v. Wa-win-ta, 37 Or. 213, 62 P. 15, 82 Am. St. Rep. 749 (1900). An adoption statute was enacted in England in 1926 (St. 16 and 17 Geo. V, c. 29).

See "Illinois Adoption Law and Its Administration," by Elinor Nims, for an

"NOTE ON ADOPTION [2]

"* * * In Sullivan v. People, 224 Ill. 468, 79 N. E. 695 (1906), it was held that the rights of the parents cannot be precluded by adoption proceedings without being made parties by service of process. In 1907 the Illinois Adoption Act was amended to conform to the suggestions of the opinion of the court in this case, and to provide a mode of making parents defendants and serving them with process. Laws Ill. 1907, p. 3.

"When the adopted child inherits from one of its adopting parents and then dies, the question arises whether descent from him as to this property shall be to the surviving adopting parent, or to the heirs by blood of the adopted child. This question is sometimes settled by the adoption statute itself in favor of the adopting parent. Swick v. Coleman, 218 Ill. 33, 75 N. E. 807 (1905). It has been held, however, that even when no provision is made by the actual words of the statute, yet the descent will be to the surviving adopting parent. Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788 (1884); Paul v. Davis, 100 Ind. 422 (1844).

"Adoption acts generally provide that the adopted child shall be in the position of a child by birth so far as inheriting from the adopting parent is concerned.

"This has a wide effect.

"Of course, when the adopting parent dies intestate, the adopted child inherits as a child by birth. Burrage v. Briggs, 120 Mass. 103 (1876); In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146 (1888); Vidal v. Commagere, 13 La. Ann. 516 (1858).

"If the adopting parent dies leaving a widow and an adopted child only, the adopted child, being entitled to take by inheritance like a child by birth, takes all the real estate and two-thirds of the personalty, and the widow can take no more than she could have taken had there been a child by birth. Sayles v. Christie, 187 Ill. 420, 58 N. E. 480 (1900); Buckley v. Frasier, 153 Mass. 525, 27 N. E. 768 (1891); Markover v. Krauss, 132 Ind. 294, 32 N. E. 1047, 17 L. R. A. 806 (1892); Moran v. Stewart, 122 Mo. 295, 26 S. W. 962 (1894); Atchison v. Atchison, 89 Ky. 488, 12 S. W. 942 (1890). Contra: Stanley v. Chandler, 53 Vt. 619 (1881). In Atchison v. Atchison, supra, the husband died testate and the widow renounced. The adopted child, therefore, could not say that he was entitled by descent to two-thirds. It was the residuary legatee who was claiming that the widow was entitled to one-third, because the adopted child was "issue" within the meaning of the

excellent discussion of modern problems concerning adoption. See Thompson's Adoption, 290 Pa. 586, 139 A. 737 (1927), for the history of adoption in Pennsylvania.

[2] Kales' Cases on Persons, pp. 112–114.

statute fixing the amount which the widow was entitled to take. This position the court sustained.

"Where a child is adopted after a will is made, and the will does not provide for it, the adopted child, being entitled to inherit like a child by birth, can, under statutes providing for the abatement of other legacies to make up a portion for a child by birth, have the same portion made up to him. Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201 (1902); In re Sandon's Will, 123 Wis. 603, 101 N. W. 1089 (1905).

"Where a will is revoked by the birth of a child, or by marriage and birth of a child, or by the birth of a child alone, the adoption of a child is as effective as the acquisition of a child by birth. Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524 (1899); Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258 (1901). Contra: Davis v. Fogle, 124 Ind. 41, 23 N. E. 860, 7 L. R. A. 485 (1890). In re Gregory's Estate, 15 Misc. Rep. 407, 37 N. Y. S. 925 (1868).

"It seems to follow, from the fact that the adopted child has a right to inherit from the adopting parent, that the adopted child's children may also do so. Power v. Hafley, 85 Ky. 671, 4 S. W. 683 (1887); Pace v. Klink, 51 Ga. 220 (1874).

"But the right to inherit from the adopting parent does not give the adopted child any right to inherit from the adopting parent's relatives directly or by representation. This is usually expressly provided for in adoption acts, but it is also the rule even where it is not expressly provided for. Keegan v. Geraghty, 101 Ill. 26 (1881); Sjoberg v. Field, 50 Misc. Rep. 412, 100 N. Y. S. 531 (1906); Moore v. Moore, 35 Vt. 98 (1862); Meader v. Archer, 65 N. H. 214, 23 A. 521 (1889); Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535 (1890); Estate of Sunderland, 60 Iowa, 732, 13 N. W. 655 (1883).[3]

"Where a deed or will makes a gift to the 'lawful heirs of A.' meaning those who inherit from A. on A.'s death, an adopted child is clearly included. Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602, 52 L. R. A. 75, 79 Am. St. Rep. 246 (1900); Johnson's Appeal, 88 Pa. 346 (1879). See, however, Reinders v. Koppelman, 94 Mo. 338, 7 S. W. 288 (1887); Morrison v. Session's Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500 (1888).

"Even where the Adoption Act does no more than put the adopted child in the same place as a child by birth for purposes of inheritance, it has been held to be sufficient to cause the adopted child to fall within the meaning of the term 'children' in a deed, will, or insurance policy executed or obtained by the adopting parent. Martin v. Ætna Life Ins. Co., 73 Me. 25 (1881); Virgin v. Warwick, 97 Me. 578, 55 A. 520 (1903). Von Beck v. Thomsen, 44 App. Div. 373, 60 N. Y. S. 1094

[3] See notes, 34 Yale L. J. 805, 3 Wis. L. Rev. 233, 38 A. L. R. 8.

(1889), affirmed 167 N. Y. 601, 60 N. E. 1121 (1901). But see Russell v. Russell, 84 Ala. 48, 3 So. 900 (1887).[4]

"Where the Adoption Act does not do more than cause the adopted child to stand in the place of the child by birth for purposes of inheritance, the adopted child does not fall within the description of the term 'child' or 'bodily heirs,' so as to take under a deed or will executed by one other than the adopting parent disposing of property to the adopting parent's 'children' or 'bodily heirs.' Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289 (1901); In re Woodcock, 103 Me. 214, 68 A. 821, 125 Am. St. Rep. 291 (1907); Cochran v. Cochran, 43 Tex. Civ. App. 259, 95 S. W. 731 (1906); Schafer v. Eneu, 54 Pa. 304 (1867).[5]

"Where, however, the Adoption Act goes farther and provides, like the acts in force in Massachusetts before 1876 (Gen. St. Mass. 1860–72, c. 310), Rhode Island (Gen. Laws, R. I. c. 192, § 6), and Illinois (Rev. St. 1874, p. 128, § 5), that the child so adopted shall be deemed, for the purpose of inheritance by such child, 'and other legal consequences and incidents of the natural relation of parent and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock,' the courts tend to recognize and give effect to the language by holding that, even in a deed or will executed by a third party and containing a gift to the children of the adopting parent, an adopted child will fall within the meaning of the word 'children' as so used, and will be entitled to take under the instrument. Sewall v. Roberts, 115 Mass. 262 (1894); Tirrell v. Bacon (C. C.) 3 F. 62 (1880); Hartwell v. Tefft, 19 R. I. 644, 35 A. 882, 34 L. R. A. 500 (1896); Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899). But see Jenkins v. Jenkins, 64 N. H. 407, 14 A. 557 (1887); Lichter v. Thiers, 139 Wis. 481, 121 N. W. 153 (1909).

"Some statutes deal specifically with the capacity of the adopted child to take as the child of the adopting parent, when in a deed or will of a third party there is a limitation to the children or issue of the adopting parent. In re Leask, 197 N. Y. 193, 90 N. E. 652, 27 L. R. A. (N. S.) 1158 (1910) Wyeth v. Stone, 144 Mass. 441, 11 N. E. 729 (1887); Blodgett v. Stowell, 189 Mass. 142, 75 N. E. 138 (1905).

"Under a statute which provided that 'legitimate children' shall have the pauper settlement of the father, an adopted child took the pauper settlement of the adopting parent, because that was one of the 'legal consequences' of being a child by birth. Washburn v. White, 140 Mass. 568, 5 N. E. 813 (1886); Waldoborough v. Friendship, 87 Me. 211, 32 A. 880 (1895), under a much more meager statute.

"Where the statute provides that the adopted child shall stand in the same place as a child by birth for the purposes of inheritance only, the adopted child has been held not to be permitted to take a legacy to the adopting parent in case of lapse under a statute providing generally that,

[4] See note, 23 Mich. L. Rev. 313.

[5] See notes, 38 Harv. L. Rev. 976, 23 Mich. L. Rev. 313.

in case of a legacy to a parent and the lapse of that legacy, the legatee's children shall take the legacy in place of the legatee. Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753 (1898). Contra: Warren v. Prescott, 84 Me. 483, 24 A. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370 (1892).

"Where the adopted child stands by virtue of the statute in place of a child by birth only for the purposes of inheritance, it is not exempt from the inheritance tax as a child by birth. Commonwealth v. Nancrede, 32 Pa. 389 (1859); Matter of Miller, 110 N. Y. 216, 18 N. E. 139 (1888).

"Where a grandfather adopts a grandchild and dies intestate, it has been held that the grandchild inherits as child only, and not in the double capacity of child and grandchild. Morgan v. Rell, 213 Pa. 81, 62 A. 253 (1905); Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698 (1889). But see Wagner v. Varner, 50 Iowa, 532 (1879)."

CHAPTER 7

ILLEGITIMATES

COOLEY et al. v. DEWEY et al.

Supreme Judicial Court of Massachusetts, 1826. 4 Pick. 93, 16 Am. Dec. 326.

This was an appeal from a decree of the judge of probate, ordering the estate of Darius Ely, deceased, intestate, to be distributed in equal shares between the several appellants and appellees, pursuant to a resolve of the Legislature passed on the 25th of February, 1825. Ely was the illegitimate son of Sybil Morgan, who died before him. He was never married. Abner Morgan and Eunice Cooley, the appellants, were the brother and sister of Sybil, and they claimed each a moiety of the intestate's estate as his next of kin and heirs at law.

Bliss, Sr., and Lathrop, for the appellants. By the civil law the mother succeeds to the estate of her illegitimate child (Just. Inst. 3. 5. 4.), but the common law of England, from the operation of feudal principles not applicable here, is different. The relation, however, between the mother and such child has for many purposes been recognized, as well in the English law as in our own, Gerrarde v. Worseley, Dyer, 374; Com. Dig. Bastard, E, cites Mo. 10; Wright v. Wright, 2 Mass. 109; and, as the mother is bound to support her child during his minority, and afterwards if he stands in need of assistance, Somerset v. Dighton, 12 Mass. 383, it is no more than justice that she should have the benefit of his property if he dies intestate. In Heath v. White, 5 Conn. 228, it has been determined that by the Connecticut statute of descents and distributions, which is similar to our own, the mother does succeed to her child's estate. Our statute, in speaking of a descent to an intestate's mother, makes no distinction between the mother of a legitimate and that of an illegitimate child, and in respect to collateral kindred it says the degrees of kindred, in all cases, are to be computed according to the rules of the civil law.

PARKER, C. J. The merits of this appeal depend upon the question, whether the mother of Darius Ely, he being a bastard, was, within the meaning of our statute of distributions, his next of kin; for, if she succeeded to his estate on his death, the two appellants, being her sisters, would of course take the whole between them, either as heirs of their sister Sybil, or through her as next of kin to the intestate.

It is not shown nor contended that by the common law their claim can be maintained, for there seems to be no maxim of that law less questionable than that a bastard is filius nullius. I do not know that it makes any difference whether the person claiming to succeed to a

bastard be father or mother; there certainly is no express distinction of that sort. Whatever may be the grounds or policy of the law, they seem to apply as well to the mother as the father, except that there is greater certainty of the mother than of the father; but, if it were the certainty only which originated this law, it might be supposed that it would have been left to depend upon proof of the fact, for in many cases the true father might be found with sufficient certainty. No doubt the law was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and, though the punishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that those who have been the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose. And if it will not for the benefit of the child, the only innocent party, surely it will allow the guilty to found a claim of property, upon a relation to the child whom they have exposed to these disabilities and privations. Our statute of distributions, though borrowed from the civil law, cannot be construed to have repealed the common law in this respect. It merely provides for the distribution of property according to the rules of that law, among lawful kindred, without adopting its principles in settling who shall compose that kindred.

It is by the grace and favor only of the Legislature that the appellants are entitled to anything, and they ought to be content to share a gift with others according to the will of the donor.

It was stated on the argument of this case that the Supreme Court of Connecticut had decided that an illegitimate child might inherit the lands of his mother. The case referred to had not then appeared in the printed Reports, but we have seen it since in the fifth volume of Connecticut Reports. It is the case of Heath et ux. v. White. In the opinion of the court, as expressed by Chief Justice Hosmer, that statute provision for descent of intestate estates controlled the common law, which it was admitted would not support such an inheritance, and considerable stress is laid upon the term "children," as used in the statute, instead of lawful issue or other more technical words of the common law. With the greatest respect for those learned judges, we are not able to adopt the opinion that our Legislature, in using the same term in our statute of descents and distributions, intended to apply the term to those who by the common law were not deemed children in a relative sense to parents; but we should think, if such had been their intention, an express provision would have been made for illegitimates. Nor do we see any particular reason for giving this construction of the term "children" in relation to the estate of the mother, any more than to that of the father; for, although the filial relation is more difficult of proof in the latter than in the former case, yet it is capable of proof, and there seems to be no other difference in the cases.

It is intimated in the case referred to, that the Legislature of Connecticut probably intended to adopt the principle of the civil law on this subject; but we are satisfied that such was not the intention of the Legislature of Massachusetts. They followed the English statute of distributions in regard to personal estate, and applied it to real estate as well as personal, without any design to deviate from the common law any further than is expressly provided by the statute. And it may be remarked, that in the statute of Charles the word "children" is used as in the Connecticut and Massachusetts statutes, but that illegitimate children do not in England inherit or participate in the distribution. Mr. Justice Bristol dissented from the opinion of the court, in the case upon which we have been commenting.

"NOTE ON ILLEGITIMATES [1]

"At common law the illegitimate child is filius nullius. He could inherit from nobody, and none but his legitimate issue could inherit from him. This was not cured by general statutes of descent and distribution, for these were, by the construction placed upon them, held to apply only to legitimates. Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326 (1826). Hence the existence of statutes, now general, which specially regulate descent to and from illegitimates, and for the most part allow them to inherit from the mother, and the mother to inherit from them, in case of the death of the illegitimate without issue. 1 Stimson, Am. St. §§ 3151–3155.

"The bastard's father is liable for its support only by statute, and that liability can be enforced only in the manner provided by statute. Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257 (1852); State v. Miller, 3 Pennewill (Del.) 518, 52 A. 262 (1902).[2] In State v. Tieman, 32 Wash. 294, 73 P. 375, 98 Am. St. Rep. 854 (1903), and Marston v. Jenness, 11 N. H. 156 (1840), is considered the question of whether the proceeding by which the father is made liable for the support of the bastard is a civil or a criminal action.

"At common law the bastard was not made legitimate by the subsequent marriage of his parents. This is now generally changed by statute. 1 Stimson, Am. St. § 6631; Monson v. Palmer, 8 Allen (Mass.) 551 (1864).[3]

[1] Kales' Cases on Persons, pp. 111, 112.

[2] See Doughty v. Engler, 112 Kan. 583, 211 P. 619 (1923) supra, p. 58, to the effect that in Kansas the father of an illegitimate child is under a duty to support him. Accord: Miller v. Miller, 116 Kan. 726, 229 P. 361, 35 A. L. R. 787 (1924).

[3] By the statute of 20 Henry III, c. 9 (1235), "he is a bastard that is born before the marriage of his parents." American statutes commonly provide that the marriage of the parents of an illegitimate shall legitimate him. Some provide for legitimation by acknowledgment of paternity, without marriage.

On the presumption of legitimacy of a child born in wedlock, and the question of what evidence may be received to rebut the presumption, see Russell v.

"From the legal recognition of the relation of parent and child between the mother and her illegitimate child, which the statute regulating descent to and from bastards makes, it seems to have followed that the mother has a legal right to the custody of the child. Barnardo v. McHugh, [1891] L. R. App. 388; Perry v. State, 113 Ga. 936, 39 S. E. 315 (1901), by statute; Pratt v. Nitz, 48 Iowa, 33 (1878); Hesselman v. Haas, 71 N. J. Eq. 689, 64 A. 165 (1906).[4]

"Query: Whether the mother is under the same duty to support her illegitimate child that a father would be to support his legitimate child?

"Query: As to mother's right to earnings and services of her minor illegitimate child till it reaches its majority?[5]

"The bastard still labors under a disadvantage by reason of the fact that, in the construction of statutes, children means primarily legitimates. Thus, in statutes giving an action for causing death to the deceased's administrator for the benefit of the deceased's 'children,' children does not include an illegitimate child. Dickinson v. North Eastern Ry. Co., 2 Hurl. & Ct. 735 (1863); Lynch v. Knoop, 118 La. 611, 43 So. 252 (1907).[6] Contra: Galveston, H. & S. A. Ry. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S. W. 705 (1907).

"For the construction of the word 'children,' 'son,' or 'issue,' in a will or settlement, as meaning primarily legitimate children, son, or issue, see Theobald on Wills (6th Ed.) p. 279.

"Where a testator devised to his son in fee, with a gift over if the son 'should die without an heir,' and the son died leaving only a bastard child, who had been legitimated by an act which provided that the bastard 'shall have and enjoy all the rights and privileges of a child born in lawful wedlock, and shall be able and capable in law to transmit any estate whatsoever as fully and effectually as if he had been born in lawful wedlock,' the gift over did not take effect. McGunnigle v. McKee, 77 Pa. 81, 18 Am. Rep. 428 (1874).

"So, where a testator devised to his daughter for life and then to her 'lawful issue,' and after his death the daughter's bastard child was legitimated under a similar statute, upon the death of the daughter leaving

Russell, 131 L. T. 148 (1924); Lynch v. Rosenberger, 121 Kan. 601, 249 P. 682 (1926); In re Wright's Estate, 237 Mich. 375, 211 N. W. 746 (1927); and comments in 24 Col. L. Rev. 430, 19 Ill. L. Rev. 280, 25 Mich. L. Rev. 915, and 75 U. Pa. L. Rev. 271. See, also, 2 Pollock and Maitland, History of English Law (2d Ed.) p. 398.

On proof of the paternity of an illegitimate child by exhibiting him to the jury to show resemblance to his alleged father, see Ratzlaff v. State, 102 Okl. 263, 229 P. 278 (1924), and comment in 20 Ill. L. Rev. 97.

[4] Accord: Jensen v. Earley, 63 Utah, 604, 228 P. 217 (1924). See note, 34 Yale L. J. 446.

[5] See Perry v. State, 113 Ga. 936, 39 S. E. 315 (1901). Observe, however, the statute mentioned in that case.

[6] Accord: State, for the Use of Smith, v. Hagerstown & Frederick Ry. Co., 139 Md. 78, 114 A. 729 (1921). Compare Miller v. Miller, 116 Kan. 726, 229 P. 361, 35 A. L. R. 787 (1924).

the legitimated child and other children born in lawful wedlock, the legitimated child was held to be entitled to share as one of the daughter's 'lawful issue.' Miller's Appeal, 52 Pa. 113 (1866).

"The actual blood relationship between the bastard and its mother's and father's kin is so far recognized as to make the marriage of a bastard with her uncle by blood incestuous. Hains v. Jeffell, 1 Ld. Raym. 68 (1696); Clark v. State, 39 Tex. Cr. R. 179, 45 S. W. 576, 73 Am. St. Rep. 918 (1898); Brown v. State, 42 Fla. 184, 27 So. 869 (1900).[7]

[7] See Uniform Laws Annotated, vol. 9, p. 133, for the text of the Uniform Illegitimacy Act, drafted by the Conference of Commissioners on Uniform State Laws. On the subject of declaratory judgments as to legitimacy, see notes, 12 A. L. R. 86, 19 A. L. R. 1135, and 50 A. L. R. 53.

MAD.D.R.

PART 2

INFANTS[1]

CHAPTER 1

INFANCY AS A DEFENSE IN CONTRACT ACTIONS

SECTION 1.—GENERAL RULE OF NONENFORCEABILITY

HOLT v. WARD CLARENCIEUX.

Court of King's Bench, 1732. 2 Str. 937.

The plaintiff declared, that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4000.

The defendant with leave of the court pleaded double (viz.) non assumpsit, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

[1] "A minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be sui juris. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years." McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572 (1868).

"It has been adjudged that, if one be born the first of February at eleven at night, and the last of January in the twenty-first year of his age, at one of the clock in the morning, he makes his will, of lands, and dies, it is a good will, for he was then of age." Holt, C. J., in Anonymous, 1 Salk. 44 (1704). Accord: Ex parte Wood, 5 Cal. App. 471, 90 P. 961 (1907); State v. Clarke, 3 Har. (Del.) 557 (1840). See Bynum v. Moore, 101 Okl. 128, 223 P. 687 (1923), and cases there cited.

"In most states, except for marriage, a person, whether male or female, is deemed of age at twenty-one; and so where the laws are silent. * * * But, in many, a woman is of age at eighteen; a man at twenty-one. And in several, a woman of any age, when lawfully married, may exercise all the powers of a married woman as if of full age. * * * And in several, all minors, male or female, attain their majority by marriage." 1 Stimson's "Amer. Statute Law in Force Jan. 1, 1886," § 6601.

In some states an infant, if above a certain age, may make a will of person-

The plaintiff joins issue on the non assumpsit, and a verdict is found for her, with £2000 damages. And as to the plea of infancy demurred.

And now this term the CHIEF JUSTICE [LORD RAYMOND] delivered the resolution of the court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is nudum pactum, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract, as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation: and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him, as to give him an opportunity to consider it when he comes of age; and it is good or voidable at his election.[2] Cro. Car. 502; 2 Roll. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Ven. 21; 1 Mod. 25; Sir W. Jones, 164. But though

alty, as he could under the rules of the English ecclesiastical courts. Local statutes should be consulted. See Davis v. Baugh, 1 Sneed (Tenn.) 477 (1853).

An infant is incapable of holding a public office requiring discretion, such as that of justice of the peace, Golding's Petition, 57 N. H. 146, 24 Am. Rep. 66 (1876); but can hold a merely ministerial office, such as that of deputy sheriff, Moore v. Graves, 3 N. H. 408 (1826), or appraiser of land to be sold on execution, White v. Laurel Land Co., 26 Ky. Law Rep. 775, 82 S. W. 571 (1904), 26 Ky. Law Rep. 1235, 83 S. W. 628 (1904). An infant may be an agent, Talbot v. Bowen, 1 A. K. Marsh (Ky.) 436, 10 Am. Dec. 747 (1819).

[2] As appears from the language of the court in this case, the executory contracts of an infant are not, generally, enforceable against him, and his plea that he was an infant at the time of making the promise sued upon will defeat an action upon his promise, even though he be of age when sued. The remainder of the chapter will be devoted to cases in which it was claimed, if not decided, that there were circumstances which should cause the court to depart from the general rule and impose a liability upon the infant or former infant, based upon his promise, or upon the facts to which his promise was related. For an exhaustive note on the whole subject of infants' contracts and conveyances, see 18 Am. St. Rep. 573–694.

the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infant's contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.[3]

SECTION 2.—NECESSARIES

RYDER v. WOMBWELL.

Court of Exchequer, 1868. L. R. 4 Exch. 32.[4]

WILLES, J. In this case the plaintiff replied to a plea of infancy, that the goods were necessaries suitable to the degree, estate, and condition of the defendant, and on this issue was taken. On the trial before the Lord Chief Baron, it was proved that the degree, estate, and condition of the defendant was that he was the younger son of a deceased baronet of good fortune and family, that during his minority he had an income of about £500 per annum, and on attaining his majority he became entitled to £20,000, that he moved in what is called the highest society, and rode races for a friend, the Marquis of Hastings, at whose house he was a frequent visitor. Amongst the articles supplied by the plaintiff upon credit, and which, according to his case and the verdict of the jury, were necessaries for an infant of this degree, were a silver-gilt goblet which he ordered for the purpose of making a present to the Marquis of Hastings, price £15 15s., and a pair of solitaires or ornamental studs, worn as the fastenings of the wristbands of a shirt,

[3] Accord: Chapman v. Duffy, 20 Colo. App. 471, 79 P. 746 (1905); Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134 (1816); Voorhees v. Wait, 15 N. J. Law, 343 (1836); Hammassapoulo v. Hammassapoulo, 134 S. C. 54, 131 S. E. 319 (1926); Harris v. Musgrove, 59 Tex. 401 (1883).

Where the infant seeks specific performance in equity, the question of mutuality is involved. In Flight v. Bolland, 4 Russell, 298 (1828), specific performance was denied. In Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638, L. R. A. 1918A, 785 (1917), specific performance was granted. See, also, Hammassapoulo v. Hammassapoulo, supra.

[4] Statement of facts is omitted.

which it is stated in the case were made of crystals set in gold and ornamented with diamonds, representing a horseshoe in which the nails were rubies. The price of these studs or solitaires was £25. No evidence was given of anything peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles.

At the close of the plaintiff's case, the defendant's counsel offered evidence that the defendant was already supplied with similar articles of jewelry to a large amount, so as to render any further supply unnecessary, but, it being admitted that the plaintiff was not aware of this, the Lord Chief Baron rejected this evidence.

Leave was reserved to move to enter a nonsuit or reduce the damages, and the question whether these two articles were, under the circumstances, necessaries, was left to the jury, who found for the plaintiff as to both of the articles above mentioned. They found for the defendant as to some other articles, which it is consequently not necessary to notice. A rule nisi was obtained in the Court of Exchequer to enter a nonsuit or reduce the verdict pursuant to the leave reserved, or for a new trial on the ground of the improper rejection of evidence.

The rule was by the majority of the Court of Exchequer made absolute, to reduce the damages to £25, the value of the studs, thus deciding that there was no evidence on which the jury could find that it was necessary for the infant to buy on credit a goblet for the purpose of making a present, but that there was evidence on which they might find that it was necessary for him to buy such studs as are above described, and the rule for a new trial on the ground of the rejection of evidence was discharged. Bramwell, B., dissented from this judgment, as in his opinion there was no evidence to go to the jury; and the evidence rejected was admissible.

On appeal, therefore, there are two questions raised before us: First, whether there was evidence on which the jury might properly find that both or either of those articles were necessaries, on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of £40 15s., or stand reduced to £25, or be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries. And, as is accurately stated by Parke, B., in Peters v. Fleming, 6 M. & W. at page 46: "From the earliest time down to the present the word 'necessaries' is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified

sense, but with the qualification above pointed out. Then the question in this case is whether there was any evidence to go to the jury that any of these articles were of that description." In the present case the first question is whether there was any evidence to go to the jury that either of the above articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in Jewell v. Parr, 13 C. B. at page 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In Toomey v. London and Brighton Railway Company, 3 C. B. (N. S.) at page 150, Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. * * * A scintilla of evidence * * * clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence"—the fact in that case to be established. And in Wheelton v. Hardisty, 8 E. & B. at page 262, in the considered judgment of the majority of the court, it is said, "The question is, whether the proof was such that the jury would reasonably come to the conclusion" that the issue was proved. "This," they say, "is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have in our opinion so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence." In this Lord Campbell agreed, though differing as to the result. See 8 E. & B. at page 266. And, taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends or wear shirt buttons composed of diamonds and rubies costing £12 10s. a piece.

We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in

his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries. The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot, be necessaries to any one of any rank, or fortune, or condition whatever? This is an important principle which, if correct, fully supports the judgment below, but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore, where evidence is given as to any facts, the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist (as it well may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that, if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the Court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy.

We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B., in the court below, many instances are put, well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not prima facie necessary for maintaining a young man in any station of life, and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessaries in this special case, and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with this view. In Peters v. Fleming, 6 M. & W. 42, the court took judicial notice that it was prima facie not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself properly in his degree. In laying down the law as to the particular case, Parke, B., says, 6 M. & W. at page 47: "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state

of thing as we believe existed at the close of the last century it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder; but, as a general rule, and in the absence of some evidence to shew that the usages of society required the use of such things, we think the rule laid down in Peters v. Fleming, 6 M. & W. at page 47, is correct. It was approved of in Wharton v. Mackenzie, 5 Q. B. 606, where Coleridge, J., says, 5 Q. B. at page 612, that in same cases it must be for the judge to decide the question. Where evidence is given, as he observes, of exceptional circumstances, the case must go to the jury with proper directions, but in the absence of any explanation the court will decide. So in Brooker v. Scott, 11 M. & W. 67, Parke, B., during the course of the argument, says, 11 M. & W. at page 68, "Prima facie, these articles are not necessaries under the circumstances, and the tradesmen must shew them to be so;" and, in giving judgment, he says, 11 M. & W. at page 69, "If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them;" and on that ground a nonsuit was entered.

No doubt there are many cases in which the court have held that such evidence had been given, and that the case could not be withdrawn from the jury, several of which are cited by the Lord Chief Baron in his judgment, but none in which it is laid down that the court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject, to take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description that, though an infant, he must obtain them on credit rather than go without.

There is, no doubt, a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so either in the court above or the court below. This is an infirmity which must affect all tribunals. But in the present case we do not think any such case has arisen, for we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were shirt buttons really got for utility, and that the degree of ornament was only accidental, or that the jury were not wrong if they so found, but on the ground that it was not a question for the court at all.

Taking this view of the law and facts, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In Bainbridge v. Pickering, 2 Wm. Bl. 1325, the Court of Common Pleas seem to have acted on a principle which would would

make the evidence admissible. In Brayshaw v. Eaton, 7 Scott, 183, Bosanquet, J., treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn, J., and Mellor, J.) acted in Foster v. Redgrave, ante, page 35, note 8. There is much to be urged in support of the view taken by the majority in the court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this court.

Judgment reversed, and a nonsuit entered.[5]

JOHNSTONE v. MARKS.

Supreme Court of Judicature, Queen's Bench Division, 1887. L. R. 19 Q. B. D. 509.

Appeal from the County Court of Westminster.

The action was by the plaintiff, a tailor, against the defendant for the price of clothes supplied. The defence was infancy, to which the plaintiff replied that the goods supplied were necessaries. It was proved at the trial that the goods in question were supplied by the plaintiff to the defendant, and that when they were supplied the defendant was under age. On the issue raised by the reply the solicitor for the defendant proposed to prove by the evidence of the defendant's father that the defendant was sufficiently supplied with clothes at the time of his purchases from the plaintiff. Upon objection by the plaintiff, the judge, on the authority of Ryder v. Wombwell, Law Rep. 3 Ex. 90, held the evidence to be inadmissible.

The judge found that some of the clothes supplied were and that others were not necessaries, and gave a verdict for the plaintiff for the price of those which he held to be necessaries.

Before Lord ESHER, M. R., and LINDLEY and LOPES, L. JJ., sitting as a Divisional Court of the Queen's Bench Division.

Lord ESHER, M. R. I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it. In Ryder v. Wombwell, Law Rep. 4 Ex. 32, the Court of Exchequer Chamber had cases before them which were inconsistent with the view taken in the court below, but, holding as they did that the goods supplied could not possibly be necessaries, there was no occasion for them

[5] Accord as to the functions of the court and jury, McKanna v. Merry, 61 Ill. 177 (1871); Smith v. Young, 19 N. C. 26 (1836).

to decide whether this evidence was relevant. A Divisional Court has since in Barnes v. Toye, 13 Q. B. D. 410, decided that the evidence is relevant and I entirely agree with the decision.

LINDLEY, L. J. I am of the same opinion. The decision of the Court of Exchequer in Ryder v. Wombwell, Law Rep. 3 Ex. 90, is contrary to the current of authority. If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him. The law is in my opinion correctly stated in Barnes v. Toye, 13 Q. B. D. 410.

LOPES, L. J. As one of the judges who decided Barnes v. Toye, 13 Q. B. D. 410, I am, of course, of the same opinion.

THE COURT added that, should the question be raised before them sitting as a division of the Court of Appeal, they would be prepared to give the same decision.

Appeal allowed.[6]

BURGHART v. HALL.

Court of Exchequer, 1839. 4 Mees & W. 727.

This was an action by the plaintiff, a tailor, to recover the amount of his bill for uniforms and other clothes supplied by him to the defendant's testator, Captain Nisbett, in his lifetime. The defendants pleaded the infancy of the testator, to which there was a replication that the goods were necessaries. The action was brought under the direction of Lord Chancellor Lyndhurst. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Michaelmas Term, 1837, it appeared that Captain Nisbett was a minor at the time when the clothes were supplied, but it was proved also that he had an allowance of 500*l.* a year, besides his pay as a captain in the Guards. The Lord Chief Baron, in summing up, expressed his opinion that if the infant had an income sufficient to provide him with necessaries suitable to his condition for ready money, he could not contract even for necessaries upon credit; and the jury, acting upon this direction, found a verdict for the defendants.

Erle obtained a rule nisi for a new trial, on the ground of misdirection.

Lord ABINGER, C. B., delivered judgment.—In this case, the rule must be absolute for a new trial. I am now convinced that I laid down the rule of law too rigorously at the trial. Mr. Erle's able argument has satisfied me that a minor is capable by law of entering into

[6] Accord: Nash v. Inman, [1908] 2 K. B. 1 (under Infants' Relief Act of 1874).

a contract, not merely for necessaries for ready money, but into any reasonable contract for necessaries, although he may have an income. I told the jury that he could not, under such circumstances, contract but for ready money. In that direction I certainly went farther than any case has carried the rule. On this ground of misdirection, therefore, there must at all events be a new trial.

Rule absolute.

NICHOLSON v. WILBORN & McWHORTER.

Supreme Court of Georgia, 1853. 13 Ga. 467.

Mary A. Nelms, before she intermarried with Duncan L. Nicholson, contracted an account with Wilborn & McWhorter, merchants in the Town of Lumpkin, Stewart County. After her marriage, Wilborn & McWhorter brought their action against Duncan L. Nicholson and his wife, for the amount of the account. To this action the defendants filed the plea of infancy—alleging, that at the time the account was made and at the time the suit was brought, Mrs. Nicholson was an infant.

The Court charged the Jury, if the guardian furnished his ward with an allowance of money, sufficient to supply herself with necessaries suitable to her age and condition in life, still, if it were not made to appear that the money was expended in purchasing such necessaries, the plaintiffs were entitled to recover, if their demand was for necessaries; and that it was incumbent on the defendants to show by proof, that the money was applied in procuring such necessaries by the minor.

To this charge the defendants excepted.

By THE COURT—NISBET, J. delivering the opinion [only that part of the opinion given which relates to the above charge].

A trader must prove in all cases, not only that the articles furnished are suited to the age and condition of the minor, but, that the minor was not, in fact, supplied from any other quarter. If the minor is supplied from any other quarter—no matter how, or by whom supplied—his supplies are not necessaries, and he cannot recover. He furnishes her, with the burden upon him of proving that the articles furnished are necessary, and are suited to her age and condition. This being the rule, when it turns out in proof that the minor has been furnished with money sufficient to supply her with necessaries, the presumption in law is, that she has been from that fund fully supplied, and the burden rests upon him to negative that presumption, and to the extent, and no farther, that he can show that she has not been supplied, will he be entitled to recover. We think that His Honor erred in charging that, in such case, the plaintiff must recover, unless the de-

fendants could show that the money was applied in procuring the necessary supplies for the minor.

Let the judgment be reversed.[7]

BAINBRIDGE v. PICKERING.

Court of Common Pleas, 1779. 2 Wm. Bl. 1325.

Davy moved to discharge the defendant on a common appearance, being held to special bail for £30. debt to a milliner, for feathered caps and other ornamental apparel; and it being proved by a copy of the parish register, that the defendant was now under twenty years of age, and the debt was of two years standing, she living all the time with her mother—

Grose shewed for cause, that the Court will not discharge her upon motion, but leave her to plead her infancy, as these things might be necessary for her state and situation in life, of which the jury are the proper judges.

But by GOULD, J. (absente DE GREY, C. J.). If an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes, or other real necessaries of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessaries: for no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother. And as there is not here any pretence but that the child was decently provided for by the mother, I think we should give no countenance to such persons as inveigle young women into extravagance, under the pretext of furnishing them with necessaries, without the previous consent of the parent.

And it is incumbent on a tradesman, before he trusts an infant with what may appear necessaries, to enquire whether he is provided for by his friends. Ford v. Fothergill, Peake, N. P. C. 229. Where the father is sued for necessaries supplied to the son, it is a question for the jury to decide, whether they can infer an authority or assent from the father to the son to order such articles. Baker v. Keen, 2 Stark. 501. Whether they are necessaries, is partly a question of law and

[7] Accord: Brent v. Williams, 79 Miss. 355, 30 So. 713 (1901); Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274 (1853). In the latter case, observe the statement of the court that, if the infant has sold the supplies or spent the money furnished and is actually destitute, he may pledge his credit.

Contra as to the burden of proof: Parsons v. Keys, 43 Tex. 557 (1875).

partly for the jury. Maddox v. Miller, 1 M. & S. 738. As to the contracts of infants, see Zouch v. Parsons, 1 Wm. Bl. 576, note (h).

BLACKSTONE and NARES, JJ., of the same opinion.

Rule absolute.[8]

MIDDLEBURY COLLEGE v. CHANDLER.

Supreme Court of Vermont, 1844. 16 Vt. 683, 42 Am. Dec. 537.

Book account. The auditor reported that he disallowed the plaintiffs' account on account of the infancy of the defendant at the time the account accrued. The County Court accepted the report of the auditor and rendered judgment for the defendant, to which the plaintiffs excepted.

ROYCE, J. The report shows that the defendant was sent by his father to become a member of the college, when he can scarcely be said to have arrived at the age of even youthful discretion. And during the first year he was not only supported at college by his father, but a correspondence was carried on between the latter and the president of the college in relation to him. During the second year he was supported by funds received from his father's estate, the officers of college then knowing that his father was dead. It does not appear that any express undertaking of the father to pay the defendant's college bills was ever given, or that any such was ever given by the defendant. Under all these circumstances we are not prepared to say, that any implied promise can legally or justly be raised against the defendant. Whilst an infant is reasonably supplied by his relatives or friends, he cannot be personally charged, even for necessaries. But the decision of the auditor seems not to have proceeded upon this view of the case, nor does the report find whether the original credit was in fact given to the defendant. We are, indeed, left to infer from the alleged ground of his decision, that, in the opinion of the auditor, such a credit ought to be implied from the facts reported. It therefore becomes proper to consider the case, as if the items charged in the plaintiffs' account were actually furnished upon the defendant's express or implied contract to pay.

[8] Accord: McKanna v. Merry, 61 Ill. 177 (1871); Perrin v. Wilson, 10 Mo. 451 (1847); Smith v. Young, 19 N. C. 26 (1836); Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652 (1831); International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912), semble; Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681 (1835), semble.

As to whether the burden of alleging and proving the inability or unwillingness of the parent to supply necessaries is on the plaintiff who sues an infant for necessaries, see Goodman v. Alexander, 28 App. Div. 227, 50 N. Y. S. 884 (1898), reversed in 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781 (1901).

In Watson v. Cross, 2 Duv. (Ky.) 147 (1865), it was held that an innkeeper may recover the cost of food and lodging furnished to an infant whose parents were willing to support him.

An infant may bind himself for necessaries. And the reason anciently assigned was, that without this power he might be exposed to perish of want. But though this was the alleged ground on which the infant's obligation was placed, yet the law has never limited its definition of the term necessaries to those things which are strictly essential to the support of life, as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence a good common school education, at the least, is now fully recognized as one of the necessaries for an infant.[9] Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is moreover essential to the intelligent discharge of civil, political, and religious duties.

But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. I would not be understood as making any allusion to professional studies,[10] or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study; for such was the course upon which the defendant professedly entered. Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in

[9] Accord: Kilgore v. Rich, 83 Me. 305, 22 A. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780 (1891), infra, p. 149.

[10] See Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574 (1880).

"But there are many branches of learning in which instruction might be highly useful and advantageous, which are not included either in a college or professional education (which most authorities hold not to be a necessary), nor in a common school education (which, according to nearly all of the authorities, is a necessary); and in those branches of learning, in most cases, it will be found that whether instruction is a necessary or not is a question depending upon the facts and circumstances of the particular case, which go to show the state, degree, and condition of life in which the infant is, the validity of whose contract may be under consideration. And such we consider the science or art of stenography. Whether a course in that branch of learning would be a necessary to a young lady seventeen years of age would depend entirely upon that particular infant's condition in life, and the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill." Beck, J., in Mauldin v. Southern Shorthand & Business University, 126 Ga. 681, 682, 683, 55 S. E. 922, 923, 8 Ann. Cas. 130 (1906).

society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in community. And we therefore consider that such an education should not be ranked among those necessaries, for which he could, as an infant, render himself absolutely liable by contract.

Judgment of county court affirmed.[11]

TUPPER v. CADWELL.

Supreme Judicial Court of Massachusetts, 1847. 12 Metc. 559, 46 Am. Dec. 704.

[Assumpsit on the general counts for labor done and materials furnished in rebuilding and repairing the defendant's house. Plea of the general issue and specification of the defense of infancy. There was evidence tending to show that the defendant's mother owned an undivided one-third of the premises for her life and there was some evidence that she had employed the plaintiff either alone or jointly with the defendant.

The defendant's counsel requested the court to instruct the jury, that if they believed the defendant to be a minor when said work was done and said materials found, he was not liable to pay for them; but the court declined to give this instruction, and charged the jury, that if the mother alone made the contract, the son was not liable; that if the son employed the plaintiff alone, or jointly with the mother, he was not liable, if he was then a minor, unless the work and materials furnished by the plaintiff were actually necessary to prevent immediate serious injury or destruction of the property; that if the repairs and work done by the plaintiff could have been postponed until the next year, or until the defendant's majority, they were not necessaries, and the defendant was not liable; that in passing upon this point, the jury might look to the actual condition in which the property was, at the time when the plaintiff was first employed, and began to work; that if, at this point of time, the roof had been stripped off, the chimneys taken down, and the frame exposed, by other workmen not connected with the plaintiff, and over whom the plaintiff had no control, so as to expose the property to immediate and irremediable injury, then so much of the plaintiff's work and materials as was requisite to prevent this, were necessaries, and if the defendant contracted for them, he was liable.

11 See Esteb v. Esteb, 138 Wash. 174, 244 P. 264, 47 A. L. R. 110 (1926), supra, p. 48, for a modern view of a college education as a necessary.

Cf. Nielson v. International Text-Book Co., 106 Me. 104, 75 A. 330, 20 Ann. Cas. 591 (1909); International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912).

The jury found a verdict for the plaintiff for $300. Upon being inquired of by the court, they stated that they had found the defendant to be a minor when the work was done, and that the whole of the plaintiff's work and materials were necessary. The defendant excepted to the ruling of the court.]

DEWEY, J. An infant may make a valid contract for necessaries; and the matter of doubt in the present case is what expenditures are embraced in the term "necessaries." In Co. Lit. 172a, it is said: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The term "necessaries," it is well settled, also embraces necessary articles for the support of his wife and children, if he has such to maintain.[12] The wants to be supplied are, however, personal; either those for the body, as food, clothing, lodging, and the like,[13] or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood.

It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, whether the expenditure, or articles contracted for, were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must be-

[12] See Chapple v. Cooper, 13 L. J. Ex. 286 (1844); Cantine v. Phillips' Adm'r, 5 Har. (Del.) 428 (1854); Price v. Sanders, 60 Ind. 310 (1878); Chapman v. Hughes, 61 Miss. 339 (1883).

[13] The following have been held to be necessaries for an infant: Dental services, McLean v. Jackson, 12 Ga. App. 51, 76 S. E. 792 (1912); a bride's trousseau, Baisden v. Gibson, 208 Ky. 341, 270 S. W. 830 (1925); Jordan v. Coffield, 70 N. C. 110 (1874); an infant's telegram to his parents for money, Western Union Tel. Co. v. Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525 (1905); the services of a lawyer for an infant in a personal injury suit, Midland Valley R. Co. v. Johnson, 140 Ark. 174, 215 S. W. 665, 7 A. L. R. 1007 (1919); Burns v. Illinois Cent. R. Co., 190 Ill. App. 191 (1914); Sutton v. Heinzle, 84 Kan. 756, 115 P. 560, 34 L. R. A. (N. S.) 238 (1911); Marx v. Hefner, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656 (1915).

But legal services in protecting the rights of an infant in his real estate are not necessaries. Grisson v. Beidleman, 35 Okl. 343, 129 P. 853, 44 L. R. A. (N. S.) 411, Ann. Cas. 1914D, 599 (1912), where the subject of legal services as necessaries is discussed at length. See, also, 44 L. R. A. (N. S.) 411 (1913).

Rent for a residence for the infant and his family is a necessary. Marceiliac v. Stevens, 206 Ky. 383, 267 S. W. 229 (1924); Newberry v. Johnson (Tex. Civ. App.) 248 S. W. 456 (1923).

Life insurance is not a necessary. Simpson v. Prudential Ins. Co. of America, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (1903). But see Equitable Trust Co. of New York v. Moss, 149 App. Div. 615, 134 N. Y. S. 533 (1912), applying a New York statute making an infant over fifteen liable upon his contracts for life insurance.

long to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper, in the particular case; and this may present a question of fact. It is therefore a preliminary question to be settled, whether the alleged liability arises from expenditures for what the law deems "necessaries," and unless that be shown, it is not competent to introduce evidence to show that, in a pecuniary point of view, the expenditure was beneficial to the minor, as that is irrelevant.

No authority has been found which, in our opinion, sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated. No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes the proper occasion for the appointment of a guardian, through whose agency such repairs can be made, and, as the law assumes, more judiciously made, than through the agency of the minor. An infant is not liable for goods bought to furnish his shop and to enable him usefully to continue trade, although he keeps a public shop. Whittingham v. Hill, Cro. Jac. 494; Whywall v. Champion, 2 Stra. 1083; 2 Stark. Ev. 726. See also Dilk v. Keighley, 2 Esp. R. 480. In such cases, the law deems the infant incompetent to carry on business, and for that reason holds him not liable for articles furnished him for trade,[14] irrespective of the question whether, in the particular state of his business, the addition to his stock was actually beneficial. That question is not open, in such cases. We think a similar rule prevails as to expenditures for improvements upon the real estate of a minor.[15] The law deems him incompetent to make such contracts; and they not being of the class embraced in the term "necessaries," no legal liability arises for such expenditures, as against the infant personally.

The exceptions being sustained upon this ground, we have not thought it necessary to consider the effect of the former judgment, recovered against Mary Cadwell, for the same repairs.

New trial ordered.

[14] Accord: Lein v. Centaur Motor Co., 194 Ill. App. 509 (1915); Lamkin & Foster v. Le Doux, 101 Me. 581, 64 A. 1048, 8 L. R. A. (N. S.) 104 (1906); Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290 (1927).

[15] Accord: Price v. Jennings, 62 Ind. 111 (1877); Wornack v. Loar, 11 S. W. 438, 11 Ky. Law Rep. 6 (1889); Horstmeyer v. Connors, 56 Mo. App. 115 (1894); Freeman v. Bridger, 49 N. C. 1, 67 Am. Dec. 258 (1856); Allen v. Lardner, 78 Hun, 603, 29 N. Y. S. 213 (1894); West v. Gregg's Adm'r, 1 Grant, Cas. (Pa.) 53 (1854); Phillips v. Lloyd, 18 R. I. 99, 25 A. 909 (1892).

Fire insurance on an infant's property is not a necessary. N. H. Mutual Fire Ins. Co. v. Noyes, 32 N. H. 345 (1855).

MAD.D.R.

McCRILLIS v. HOW.

Superior Court of Judicature of New Hampshire, 1826. 3 N. H. 348.

Assumpsit upon a note, dated February 21, 1823, for $21.92, made by the defendant and payable to the plaintiff or order. There was also a count upon an account for medicines and visits, as a physician, amounting to $21.92.

The cause was submitted to the decision of the court, upon the following facts. The plaintiff did the services, and furnished the medicines, mentioned in the second count; but at the time, the defendant was an infant under the age of twenty-one years. The services so rendered, and the medicines so delivered, were necessary and proper for the defendant. On the 21st February, 1823, the defendant gave to the plaintiff the note, mentioned in the first count, to balance said account; and the plaintiff did balance the account upon his book, by giving credit for the said note. At the time the said note was given, the defendant was an infant, under the age of twenty-one years.

By the Court. It has long been settled, that no action can be maintained against an infant upon a promissory note.[16] The reason assigned is, because, if the note was held to be valid, the infant would, when the note was in the hands of a bona fide endorsee, be precluded from disputing the original debt. Chitt. on Bills, 24; 1 D. & E. 40, Freeman v. Hurst; 3 Caines (N. Y.) 323, Van Winkle v. Ketcham; 10 Johns. (N. Y.) 33, Swasey v. Adm'r of Vanderheyden; 2 Starkie, 36, Ingledew v. Douglas; Campbell, 552, Williamson v. Watts; Carthew, 160, Williams v. Harrison et al.

The plaintiff then cannot recover upon his first count. But we see no objection to a judgment in his favor, on the second count. A void note, given to balance an account, is no satisfaction. 2 Johns. (N. Y.) 455, 3 Am. Dec. 446, Markle v. Hatfield; 1 Esp. N. P. R. 5; 6 D. &

16 Accord: Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759 (1882); Fenton v. White, 4 N. J. Law, 100 (1818); Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33 (1813); Bouchell v. Clary, 3 Brev. (S. C.) 194 (1815); McMinn v. Richmonds, 6 Yerg. (Tenn.) 9 (1834).

And an adult payee endorser is liable without any suit against the infant maker. Morton v. Steward, 5 Ill. App. 533 (1879). Accord, as to a note given to settle a tort liability: Deal v. Hanks, 3 McCord (S. C.) 257 (1825).

"In an action on a contract against a minor, he is liable to pay only what the necessaries furnished to him are reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessaries, the real value will be inquired into, and he will be held only for that amount. Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761 (1886) citing Earle v. Reed, 10 Metc. (Mass.) 387." Sweeney, J., in Quinley v. Desautels, 45 R. I. 106, 120 A. 65 (1923). To the same effect, see Gregory v. Lee, 64 Conn. 407, 30 A. 53, 25 L. R. A. 618 (1894); Smith v. Crohn (Tex. Civ. App.) 37 S. W. 469 (1896); Keener's Quasi Contr. p. 20.

An infant is not liable for necessaries contracted for, but not yet furnished to, him. Peacock Military College v. Hughes (Tex. Civ. App.) 225 S. W. 221 (1920); Gregory v. Lee, supra.

E. 52, Puckford v. Maxwell; 1 N. H. 281, 8 Am. Dec. 68, Wright v. First Crockery Ware Co.; 3 Brod. & Bing. 295; 7 Taunton, 312, Hickling v. Hardy; 4 East, 147.

Judgment for the plaintiff.

DUBOSE v. WHEDDON.

Court of Appeals of South Carolina, 1827. 4 McCord (S. C.) 221.

This was a summary process on a note of hand. Plea non assumpsit and infancy. Issue taken on the first, and replication to the second plea, that the note was given for necessaries.

Huger, J., decreed for the defendant on the ground that a note given by an infant, even though for necessaries, is void. Plaintiff appealed.

CURIA, PER NOTT, J. The only question in this case is, whether an infant can bind himself by a promissory note for necessaries. It is a little remarkable that a question of such frequent occurrence should remain to be settled at this day. But I think that although the decisions on the subject are somewhat contradictory, there can be but little doubt on the question now immediately before us. Lord Coke says, that an infant cannot bind himself in a bond with a penalty, even for necessaries. 171–2. From whence it has been inferred that a single bill without a penalty would be good, 3 Co. 172—and it is there said that it has been often so adjudged—see Ayliff v. Archdale, Cro. Eliz. 920; Earle v. Peale, 1 Salk. 387; 3 Bacon, 594–5. And if an infant can bind himself by a single bill, it would seem to follow as a necessary consequence, that he may bind himself by a simple contract. But in the case of Williamson v. Watts, 1 Campbell, 552, in an action of assumpsit on a bill of exchange, where the defendant pleaded infancy, and the plaintiff replied necessaries, Sir James Mansfield said the replication was nonsense; and asks emphatically whether any one ever heard of an infant being liable as acceptor of a bill of exchange. And in the case of Trueman v. Hurst, 1 Term Rep. 40, it was held that an infant was not liable on a negotiable note, nor an account stated, but I cannot see the good sense of the rule, and if I am permitted to use as strong language as Sir James Mansfield I would say it is nonsense to hold that an infant may bind himself by a single bill and not by an account stated.

Judge Reeve, in his treatise on Domestic Relations, 230–1, lays down the rule, that "when the security is of such a nature that by the rules of law, the consideration cannot be inquired into, then the infant is not liable," from whence it is concluded that he is not liable on a bond or negotiable note after it is negotiated, but that he is liable on a note given for necessaries, provided it be not negotiable and even on a negotiable note while it remains in the hands of the original payee.

I have no doubt of the correctness of this conclusion, and that is enough for our present purpose. I can see no reason why he may not be bound by a bond or bill of exchange. It is not true that no inquiry can be made into the consideration. The statutes against usury and gaming are every day set off as defences to actions on bills of exchange and negotiable notes, even in the hands of innocent indorsees. And in addition to those cases, no defense is more common in our courts to an action on bond, than a failure of consideration. If infancy can be pleaded to an action on bond, or on a bill of exchange, why may not a replication that the contract was for necessaries, be allowed? However, it is not my intention to go beyond the case now under consideration. I think the replication ought to have been sustained, and the decree must therefore be reversed.

Decree reversed.[17]

KILGORE v. RICH.

Supreme Judicial Court of Maine, 1891. 83 Me. 305, 22 A. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780.

This was an action of assumpsit on an account annexed. The defendant pleaded the general issue, with a brief statement averring his infancy. The case is stated in the opinion.

PETERS, C. J. The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board-bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel; necessary physic, and such other necessaries, and likewise his good teaching or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the

17 Accord: Earle v. Reed, 10 Metc. (Mass.) 387 (1845), semble; Melton v. Katzenstein (Tex. Civ. App.) 49 S. W. 173 (1899); Bradley v. Pratt, 23 Vt. 378 (1851). To the same effect as to a note given in settlement of a tort liability: Swoboda v. Nowak, 213 Mo. App. 452, 255 S. W. 1079 (1923); Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519 (1878).

See Daniel, Neg. Instr. (6th Ed.) § 226, to the effect that a holder in due course of a negotiable instrument given by an infant for necessaries should be allowed to recover from the infant to the extent of the reasonable value of the necessaries. See Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720 (1896), for such a decision in a case of the note of an insane person.

contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the case satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In Clarke v. Leslie, 5 Esp. 28, it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessaries would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. Swift v. Bennett, 10 Cush. 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in Conn v. Coburn, 7 N. H. 368, a person who signed an infant's note given for necessaries, as a surety, was allowed, after payment of the note, to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. Randall v. Sweet, 1 Denio, 460, is precisely in point in the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessaries with it. "But," says Mr. Bishop, "one who pays money at his [infant's] request to a third person for necessaries can recover it." Bish. Cont. § 914. The difference is between lending or paying. Mr. Wharton (Whart. Cont. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessaries stands in the position of the tradesman who furnishes the necessaries. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it; and there really is no good reason to defeat his claim as it is here presented.

Exceptions overruled.[18]

WALTON, VIRGIN, LIBBEY, HASKELL, and WHITEHOUSE, JJ., concur.

[18] Accord: Clarke v. Leslie, 5 Esp. 28 (1803); Randall v. Sweet, 1 Denio (N. Y.) 460 (1845), and see authorities cited therein; also where the adult, at the infant's request, purchases on his own credit necessaries for the infant, Swift v. Bennett, 10 Cush. (Mass.) 436 (1852); Smith v. Oliphant, 4 N. Y. Super. Ct. 306 (1849).

DARBY v. BOUCHER.

Court of Common Bench, 1693. 1 Salk. 279.

[In assumpsit for money lent out and laid out to the use of the defendant's wife while sole. Upon trial before Treby, C. J., it was held that evidence of the infancy of the feme at the time of the promise could be given under the general issue. The report continues:]

And in this case there was another question made, which was, One lends an infant money, who employs it in paying for necessaries, whether in that case the infant be liable? And it was held clearly by the Chief Justice, that the infant is not liable; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not by matter ex post facto entitle the plaintiff to an action.[19]

SECTION 3.—BENEFITS

HALL et al. v. BUTTERFIELD.

Supreme Court of New Hampshire, 1879. 59 N. H. 354, 47 Am. Rep. 209.

Assumpsit, to recover for goods sold and delivered. The defendant pleaded infancy, and the question was reserved whether that was a bar to the plaintiffs' recovery. The defendant was engaged in trade, and the goods were purchased by him for the purposes of trade, and were not necessaries within the ordinary meaning of that term.

STANLEY, J. The defendant interposes the plea of infancy as a bar to the plaintiffs' right to recover, and, so far as this right depends on an express contract, it is a complete answer. The express contract, on which the plaintiffs rely, was voidable at the defendant's election, but it does not necessarily follow, because the defendant exercises his privilege to avoid the contract, that he is under no liability to the plaintiffs. * * *

It is apparent that the tendency of the later decisions is to enlarge the liabilities and obligations of infants; and, while the liability has not in their case been extended so far as it has in regard to lunatics and persons non compos mentis, the principle on which it rests is the same. The grants of infants and persons non compos are parallel, both in law and reason. Thompson v. Leach, 3 Mod. 301; Seaver v. Phelps, 11 Pick.

[19] But an infant is liable in equity under such circumstances. Marlow v. Pitfield, 1 P. Wms. 558 (1719); Price v. Sanders, 60 Ind. 310 (1878). See, also, Beeler v. Young, 1 Bibb. (Ky.) 519 (1809).

(Mass.) 304, 22 Am. Dec. 372; Breckenridge's Heirs v. Ormsby, supra [1 J. J. Marsh. Ky. 236, 19 Am. Dec. 71]. In view of these facts, no reason appears why the wise and just principle enunciated by Lord Mansfield should not be given its full force, and the rights and obligations of lunatics, persons non compos mentis, drunkards, when in such a state as to be entirely bereft of reason, and infants, be placed on the same ground. The obligation to account only for the benefit actually received secures ample protection from fraud and imposition, and at the same time prevents the privilege from being used to perpetrate fraud. It prevents their disability from being, "not their protection merely, but an extraordinary legal ability to rob others; not a shield, but a sword; not a mere legal incapacity to be plundered by their fellowmen, but a vast capacity to plunder them with impunity."

The right to recover for necessaries is given, because the infant has derived a benefit therefrom. It is upon no other ground. If the benefit is the foundation of the right, why should it be limited to necessaries? It cannot be said that the infant, if engaged in trade or business, may not derive a benefit therefrom. If benefit obtained by the infant is the test in one case, why not make it the test in all cases? This has been made the test in the case of lunatics and persons non compos mentis, and it should be applied in the case of infants. The true rule is, that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract. The question whether the infant has received a benefit—like the question of what are necessaries, and what sum the infant ought to pay for them, or the question of negligence or ordinary care, and other similar questions—is one of mixed law and fact. No uniform rule can be established. A contract, which under some circumstances to one person might be beneficial, under others and to another might be injurious. In no two cases are we likely to find the same facts; and it must always be for the trier to apply the law to the facts, and determine whether the infant has been benefited, and to what extent. Bing. Inf. Bennett's notes, 88.

Our conclusion is, that the plea of infancy is not a bar to the plaintiff's recovery, but that they may recover to the extent of the benefit received by the defendant, not exceeding the price he agreed to pay for the goods.

Case discharged.[20]

BINGHAM, J., did not sit; the others concurred.

[20] The doctrine that recovery may be had against an infant for benefits, as distinguished from necessaries, has received little recognition. See infra, pp. 250–260, for the recurrence of this doctrine in cases where the infant seeks to recover money or property or rights transferred or released by him, for which he received benefits. See, also, Williston on Contracts, § 238.

SECTION 4.—ESTOPPEL

MERRIAM v. CUNNINGHAM.

Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 40.

[Assumpsit for the keep of four horses. The principal defense was infancy. The plaintiff offered evidence tending to show that the defendant fraudulently represented himself to the plaintiff as being of full age, and thereby obtained credit for the amount sued for. He claimed that the defendant was thereby estopped to set up the defense of infancy. But the judge ruled that such representation upon the part of the defendant would be no reply to the defense of infancy, and excluded the evidence. Verdict for the defendant.]

BIGELOW, J. The plaintiff seeks to avoid the defendant's plea of infancy in the present case by proof that the defendant fraudulently represented himself to be of full age, and thereby obtained credit for the keep of the horses, to recover the price of which this action of assumpsit is brought. But it appears to us, that no such answer to a plea of infancy can be allowed, without overturning the well established rules of law applicable to the contracts of minors. The plaintiff seeks to recover upon a contract which, upon plea and proof, is legally avoided. The fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or, in any way, enhance its obligation; it is the contract, which forms the sole right of the plaintiff to recover in this suit, and no liability upon it, as such, can be maintained against the defendant, who has established its legal invalidity. If the position assumed by the plaintiff is sound, then the result would be that a plaintiff in an action of assumpsit on a contract, which the law holds void, would recover damages for an injury caused by the fraudulent misrepresentations of the defendant. It is manifest that no such confusion of rights and remedies can exist in the law. Besides; in an action of assumpsit, the measure of damages is the amount which the defendant promised to pay by his contract; but for fraudulent representations the plaintiff could recover only the damages actually sustained; which might, and often would be much less than the amount due on the contract, for the very reason, that the infant may have been overreached, and promised to pay more than an equivalent for that which he received by the contract. The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings.

It is by no means clear, that an action ex delicto can be maintained against an infant for fraudulently representing himself to be of age,

and by means of such representation and deceit, procuring credit on a contract, which he subsequently avoids by a plea of infancy. The cases are not uniform on this question. The earlier authorities are clear to the point that no such action can be maintained. Johnson v. Pie, 1 Lev. 169, and 1 Keb. 905; Grove v. Nevill, 1 Keb. 778, 914; Green v. Greenbank, 2 Marsh. 485. It has been argued in regard to cases of this kind, that the representation itself is not actionable, because it is no injury. It is the avoidance of the contract which causes damage and creates the injury, and that was merely the exercise of a legal right by the infant for which no action will lie; that no such action can be maintained without making the contract an essential part of the right of recovery, which being void, leaves nothing upon which the infant can be legally charged. 20 Amer. Jur. 265; 1 Amer. Lead. Cas. 118; Bing. on Inf. (2d Am. Ed.) 113, note. But without expressing an opinion on this point,[21] it is entirely clear that such false representations are no sufficient answer to a plea of infancy in an action on a contract. Even in New Hampshire,—where it is held that an infant is liable to an action ex delicto for fraudulent representations as to his age in procuring a contract, which he subsequently avoids by a plea of infancy, Fitts v. Hall, 9 N. H. 441,—it has been decided that such representations cannot be set up as an answer to a plea of infancy in an action on a contract. Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. See West v. Moore, 14 Vt. 447, 39 Am. Dec. 235; People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240. The only case cited by the plaintiff in support of his position, Bristow v. Eastman, 1 Esp. 172, does not sustain the doctrine for which he contends. That was an action in form ex contractu against an infant for a tort in embezzling money, and it was intimated by the court that the act being one for which an infant was in law liable, and to an action for which infancy was no defence, the form of the remedy might be the same as against an adult, and therefore that the plaintiff might waive the tort, and sue in assumpsit. The authority of this case has been questioned, 20 Amer. Jur. 267; and whether sound or not, furnishes no analogy to the case at bar.[22]

[Remainder of the opinion omitted. Other exceptions sustained.]

21 The question of an infant's liability ex delicto for a false misrepresentation made in connection with a contract is treated infra, p. 310ff.

22 Accord: Burdett v. Williams (D. C.) 30 F. 697 (1887), semble; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412 (1880), semble; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146 (1839); Studwell v. Shapter, 54 N. Y. 249 (1873).

"As applied to the facts in the case at bar, the law, as I view it, is that, if a youth under twenty-one years of age, by falsely representing himself to be an adult, which he appears to be, for the purpose of inducing another to enter into a contract with him, and thereby, through such representation and appearance, the other party is led to believe that such infant is an adult, and makes a contract with him, the benefit of which he obtains and retains, then, in a suit on that contract, the minor will not be permitted to set up the priv-

SECTION 5.—EQUITY

Ex parte UNITY JOINT-STOCK MUT. BANKING ASS'N.
In re KING.
Ex parte KING.

Court of Appeal in Chancery, 1858. 3 De Gex & J. 63.

Application to a commissioner to allow the claim of the Unity Joint-Stock Mutual Banking Association against the Estate of Octavius King, a Bankrupt. It appeared that Octavius King had obtained advances from the applicant and had given a bond and other collateral security to secure the same. At the time he represented himself to be twenty-two years of age. He was in fact an infant. The commissioner allowed the proof. Appeal by the assignees and also a creditor.

The Lord Justice KNIGHT BRUCE. It is unnecessary to say what in this case we might have thought it fit to do if we had been exercising a jurisdiction merely legal, for our jurisdiction is equitable as well as legal. Again, with respect to our equitable jurisdiction, it is not material to say what we might have thought the proper course to be taken in the absence of decision; for I think that, upon the admitted facts, the case is concluded by the judicial opinions of Lord Cowper, Lord Hardwicke, Lord Thurlow and other eminent judges, which it would be improper in us practically to question. A young man, who from his appearance might well have been taken to be more than twenty-one years of age, engaged in trade, and wished to borrow or to obtain credit, and for the purpose of so doing represented himself to the petitioning creditor as of the age of twenty-two, expressly and distinctly so represented himself. We feel no difficulty or doubt on the question, whether the minor did at the time believe or not believe what he said, for it is impossible from the materials before us to infer that he did believe his statement to be true or was ignorant of his own age when he obtained the money. The question is, whether in the view of a Court of Equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt, whatever his liability or non-liability at law. In my opinion we are compelled to say that he has.

The Lord Justice TURNER. I have the strongest inclination to expunge this proof; but the authorities are too strong to permit us

ilege of infancy, because by his fraudulent conduct he has estopped himself from so pleading; and this in a court of law as well as in a court of equity." Walker, Chancellor, in La Rosa v. Nichols, 92 N. J. Law, 375, 105 A. 201, 6 A. L. R. 412. Accord: Hood v. Duren, 33 Ga. App. 203, 125 S. E. 787 (1924); Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50 (1910), semble.

to do so. If the course which has been taken by Courts of Equity on this subject is to be altered, it must be so by the House of Lords and not by us.[23]

R. LESLIE, Limited, v. SHEILL.

Court of Appeal, King's Bench Division, 1914. 3 K. B. 607.

Appeal of the defendant from a decision of Horridge, J., after trial with a common jury.

The plaintiffs were a firm of registered money lenders, and they sued the defendant, to whom they had made two advances of £200 each, to recover £475, being the amount of the advances with interest, on the ground that the defendant had obtained the advances by fraudulently representing that he was of full age at the time; in the alternative, they claimed the £475 as money had and received by the defendant to the use of the plaintiffs. The defendant was still a minor at the date of the issue of the writ, though he attained full age before the trial. The learned judge left the following question to the jury: "Were the plaintiffs induced to make the two advances of £200 each, or either of them, by the fraudulent misrepresentation of the defendant that he was twenty-one?" to which the jury answered, "Yes; both." Upon further consideration, Horridge, J., ordered judgment to be entered for the plaintiffs for £400.

The defendant appealed.

April 6. KENNEDY, L. J., read the following judgment of

LORD SUMNER. * * *[24] Much reliance was placed on In re King, Ex parte Unity Joint Stock Mutual Banking Association, 3 De G. & J. 63, with which should be read the comments on it by Bacon, V. C., in Ex parte Jones, 18 Ch. D. at page 115, (which are in point, though his actual decision was overruled) and by Baggallay, L. J., at page 123. In that case the debtor, King, while under age, had obtained advances from the association by a fraudulent misrepresentation that he was of full age. He was adjudicated bankrupt after he came of age, and the association was admitted to prove in the bankruptcy for the amount advanced. The Lords Justices arrived at this con-

[23] Accord: Cornwall v. Hawkins, 41 Law J. Ch. 435 (1872), decree for specific performance against infant; United States Inv. Corp. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326 (1901), suit to foreclose; Commander v. Brazil, 88 Miss. 668, 41 So. 497, 9 L. R. A. (N. S.) 1117 (1906), foreclosure of deed of trust, with deficiency decree against infant; Pemberton Building & Loan Ass'n v. Adams, 53 N. J. Eq. 258, 31 A. 280 (1895), semble, bill to foreclose; First State Bank v. Edwards (Tex. Civ. App.) 245 S. W. 478 (1922), suit to foreclose chattel mortgage, no misrepresentation of age by infant, but infant's conduct was such that plaintiff thought he was of age.

[24] Only a part of the opinion of Lord Sumner is given. The opinions of Kennedy, L. J., and A. T. Lawrence, J., are omitted.

clusion somewhat reluctantly on the authority of uncited decisions of Lord Cowper, Lord Hardwicke, and Lord Thurlow. Lord Cowper's case is probably Watts v. Creswell, 9 Vin. Abr. titl. Enfant, N., pl. 24, p. 415, in which he says that, if an infant was old enough and cunning enough to carry on a fraud, he ought in a court of equity to make satisfaction for it. Lord Hardwicke's opinion may be that in Earl of Buckinghamshire v. Drury, 2 Eden, at page 71, "Minors are not allowed to take advantage of infancy to support a fraud," against which should be set Lord Mansfield's more particular statement in the same case, at page 72, that, if the infant took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent by pretense of infancy. The allusion to Lord Thurlow probably is to the case of Beckett v. Cordley (1784) 1 Bro. C. C. 358, where he said, "If there was fraud of which the infant was cognizant, she would be bound as much as an adult." If these be the authorities relied on in Re King, Ex parte Unity Joint Stock Mutual Banking Association, 3 De G. & J. 63, and I can find none nearer, they hardly touch the decision in that case, nor do they, or the decision itself in Re King, 3 De G. & J. 63, affect the case now before us. There, the bankruptcy standing unchallenged and the question being how the assets should be administered among competing creditors or claimants, it was held that persons who had been defrauded by the bankrupt when under age and thereby induced to lend him money had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word. It is clear that Jessel, M. R., thought the decision anomalous and one not to be extended. See Ex parte Jones, 18 Ch. D. at pages 120, 121. Since then it has been decided in Reg. v. Wilson (1879) 5 Q. B. D. 28, that an infant cannot be convicted, under section 12 of the Debtors Act, 1869, of quitting the country fraudulently with property that ought to be divided among his creditors, since in law he has none. Whatever may be said of In re King, 3 De G. & J. 63, now, it does not govern the present case, but it must be admitted that the language of the Lords Justices is hardly consistent with any other view than that the bankrupt was in equity personally liable to pay the debt in question. There is further language of a similar kind in Maclean v. Dummett (1869) 22 L. T. at page 711, where the Privy Council speaks of an infant as "contracting debts" in his trade by fraudulently asserting himself to be of full age, but this again was not necessary to the decision. These seem to be all the material dicta.

As to the cases, Clarke v. Cobley (1789) 2 Cox. 173, is one in which the court restored the status quo affected by an infant's fraud by ordering him to return promissory notes, the surrender of which he had procured by falsely stating that he was of age, and by putting him under terms not to plead the statute of limitations if sued upon them, but a decree against him to pay the amount of the notes, though he was now of age, was expressly refused. In Cory v. Gertcken (1816) 2 Madd. 40, where Sir T. Plumer says, "Though in general a payment to

an infant may be bad, yet, if the infant practices a fraud, he is liable for the consequences," he only decided that a person could not make his trustee pay over again a sum that he had got from him by fraudulently representing himself, while still an infant, to be already of full age, and in Chubb v. Griffiths, (1865) 35 Beav. 127, Lord Romilly, M. R., when saddling an infant defendant with costs who had been passing off his safes as Chubb's safes, says that he does so "on the principle laid down in Cory v. Gertcken" (1816) 2 Madd. 40. What he conceived this principle to be I can hardly tell, but at any rate it is not a general liability in equity for fraud. Jessel, M. R., in Re Jones, 18 Ch. D. at page 118, regards Cory v. Gertcken (1816) 2 Madd. 40, as a pure action of tort. The grounds of an infant defendant's liability for costs were again discussed in Woolff v. Woolff [1899] 1 Ch. 343, another case of similar dishonesty, and the liability was rested on the above principle and authority, also without any hint of a wider one that in equity an infant is generally liable for fraud. I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to shew that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to In re King, Ex parte Unity Joint Stock Mutual Banking Association, 3 De G. & J. 63. Restitution stopped where repayment began; as Kindersley, V. C., puts it in Vaughan v. Vanderstegen (1854) 2 Drew. 363, an analogous case, "You take the property to pay the debt."

Last year, in Stocks v. Wilson, [1913] 2 K. B. 235, an infant, who had obtained furniture from the plaintiff by falsely stating that he was of age and had sold part of it for £30, was personally adjudged by Lush, J., to pay this £30 as part of the relief granted to the plaintiff. This is the case which more than any other influenced Horridge, J., in the court below. I think it is plain that Lush, J., conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods, which he could not restore because he had sold them. The argument was that equity would not allow him to keep the goods and not pay for them, that, if he kept the property, he must discharge the burthen, and that he could not better his position by having put it out of his power to give up the property. Lush, J., expressly says, [1913] 2 K. B. at page 247, "It is a jurisdiction to compel the infant to make satisfaction;" and, at page 246, "The remedy is not on the contract." At pages 242, 243, he says: "What the court of equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages and compensation for the loss of the other party's

bargain. If the infant has obtained property by fraud, he can be compelled to restore it;" but now comes the proposition, which applies to the present case and is open to challenge, "if he has obtained money, he can be compelled to refund it." The learned judge thought that the fundamental principle in Re King, Ex parte Unity Joint Stock Mutual Banking Association, 3 De G. & J. 63, was a liability to account for the money obtained by the fraudulent representation, and that, in the case before him, there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this be his ratio decidendi, though I have difficulty in seeing what liability to account there can be (and certainly none is named in Re King, Ex parte Unity Joint Stock Mutual Banking Association, 3 De G. & J. 63, the decision in Stocks v. Wilson, [1913] 2 K. B. 235, is distinguishable from the present case, and is independent of the above dictum, and I need express no opinion about it. In the present case there is clearly no accounting. There is no fiduciary relation; the money was paid over in order to be used as the defendant's own, and he has so used it, and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act.

Accordingly the appeal succeeds; the judgment must be set aside and entered for the defendant. He will have the costs here, where he succeeds, and of the further consideration below, where he ought to have succeeded. Further than this, there should be no costs given him. He cannot be made to pay the costs of the action, in which he was entitled to judgment, but I think that, as he was charged with fraud and found guilty of it, he must pay the costs of that issue, to be set off against such costs as he gets, and as to any other general costs of the action, which must be small, I think there is good ground for saying that there be no order for payment on either side.

Appeal allowed.[25]

[25] Contra: Levene v. Brougham, 24 Times Law. Rep. 801 (1908). Cf. Bartlett v. Wells, 1 Best & S. 836 (1862).

NEW YORK BLDG. LOAN & BANKING CO. v. FISHER et al.

Supreme Court, Appellate Division, First Department, 1897. 23 App. Div. 363, 48 N. Y. S. 152.

PATTERSON, J. This is an action for the foreclosure of a mortgage. All the allegations of the complaint are appropriate to such an action only. The defendant John H. Fisher, Jr., was the mortgagor. He interposed the defense of infancy, and that defense was fully proven. The mortgage and the bond to which it was collateral were therefore voidable, at the election of the mortgagor, who disaffirmed them by interposing the defense mentioned. The mortgage was given to raise money to enable the infant to construct a building upon his land, but that fact does not aid the plaintiff.

In Allen v. Lardner, 78 Hun, 603, 29 N. Y. Supp. 213, it was so decided. In that case, as in this, a mortgage was given by an infant as security for money borrowed, and which was used in the erection of a dwelling house on the minor's land. It was held that the mortgage was void on the ground of the infancy of the mortgagor. The general rule is not controverted by the plaintiff, the appellant here; but it is, in effect, claimed that by reason of fraud and misrepresentation on the part of the infant and his father, in the procurement of moneys and obligations from the plaintiff which constitute the consideration for the mortgage sought to be foreclosed, the court should ignore the defense of infancy, and recognize and enforce the mortgage, or declare a lien in favor of the plaintiff on the premises at least to the extent of advances made by the plaintiff in good faith and in ignorance of the disability of the mortgagor. That there was fraud and deception in the dealings between the parties out of which this mortgage security arose seems to be established; but that does not furnish a reason for the judicial establishment of the validity of the mortgage, in whole or in part. That either the infant or his father represented at that time the mortgage was made, or prior thereto, that such infant was of full age, does not affect this case. The infant is not estopped from insisting upon his defense, even though he himself falsely stated that he was over 21 years of age.

In Studwell v. Shapter, 54 N. Y. 249, the court considered the effect of false representations by an infant as to his age, and remarked that such representations would not make the infant liable on his contract; and in Heath v. Mahoney, 7 Hun, 100, the court says: "It is very clear that the agreement entered into between the parties was invalid, by reason of the infancy of the defendant. An infant is, however, liable for his willful torts and for damages for frauds committed by him; but no fraudulent representation made by an infant can give validity to any contract entered into by him which would otherwise be voidable for his infancy. Studwell v.

Shapter, 54 N. Y. 249, and cases there cited. The action must, in all cases, arise solely upon the tort or wrong committed by him."

In Kobbe v. Price, 14 Hun, 55, the court refers to the case of Studwell v. Shapter, and states that in that case "it was held that fraudulent representations made by an infant to induce another person to enter into a contract with him would not give validity to the contract itself. In that case, as in this, the action was brought upon the contract itself, and not for any fraud perpetrated by means of alleged false representations. The evidence tended to show false representations, but the court held they were insufficient to charge the defendant with legal liability on the contracts which the plaintiffs were by those representations induced to enter into with the infant." The language last quoted is directly applicable to the case at bar. The text writers announce the same rule. Tyler, Inf. pp. 53, 57, where numerous authorities sustaining the proposition are cited.

Apart, therefore, from the consideration that under this complaint, as it is framed, there are no allegations to support an award of any other relief than that strictly applicable to the foreclosure of a valid mortgage, it seems to be settled that the fraudulent representations of the minor in relation to his age would not be the basis of any other action than one upon the case for deceit.

It is also claimed that the infant should not be allowed to repudiate his contract without making restitution of that which he has received under it. It is true that courts of equity have gone to a considerable extent in the direction of compelling minors who seek to avoid their contracts on the ground of infancy to make restitution of what they have received from those who were in ignorance of the disability at the time the contract was made, but in every one of those cases it was made to appear that the infant still retained in his possession or under his control that which he had received or some part of it. If he has disposed of, spent, or even squandered the money or other consideration received, his right to disaffirm is not limited or affected. Kane v. Kane, 13 App. Div. 544, 43 N. Y. Supp. 662; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233. But it is to be observed in this case that no part of the consideration for this mortgage was paid to the infant himself, although moneys were expended for the benefit of his real estate upon which the mortgage was given. The sum of $1,422.19 was disbursed by the plaintiff on account of the land. That sum consisted of an advance of $1,000 for the purpose of filling in sunken lots, $150.52 paid for fire insurance premium, and two other items paid for interest on two other mortgages on those lots; but none of this money ever was paid to the infant. There is no way by which those advances can be returned to the plaintiff through a foreclosure of the void mortgage. A similar question was presented in Allen v. Lardner, supra, and it was there held that, upon disaffirming the bond and mortgage in that case, no restitution by the infant was necessary of the moneys

advanced on the mortgage, and which had gone into the improvement of the property covered by that mortgage.

The judgment of the court below was right, and must be affirmed, with costs. All concur.[26]

SECTION 6.—CONTRACTS IN SETTLEMENT OF TORT LIABILITY

QUINLEY v. DESAUTELS.

Supreme Court of Rhode Island, 1923. 45 R. I. 106, 120 A. 65.

Action by Raymond A. Quinley against Alfred Desautels. Defendant's motion for a directed verdict was denied, and he excepts. Exceptions sustained.

SWEENEY, J This is an action of assumpsit, and the declaration contains only the common counts. The defendant pleaded infancy, and the plaintiff replied that his claim was founded upon the agreement of the defendant to settle his tort liability. The defendant demurred to this replication, and the demurrer was overruled. The case proceeded to trial, and the jury returned a verdict for the plaintiff. At the close of the testimony, the defendant made a motion for a directed verdict. This motion was denied, and the case has been brought to this court upon the defendant's exception to the denial of said motion.

The plaintiff claims that he was injured by an automobile driven by the defendant. His testimony is to the effect that one morning, soon after leaving his home to go to work and while crossing a public highway, he was struck by an automobile, and when he recovered consciousness he was in a hospital. At the end of 13 weeks he had sufficiently recovered from his injuries so as to be able to resume work. The plaintiff's wife testified that she met the defendant and that he told her that he would pay $10 per week while her husband was out of work. The defendant testified that he did not promise to pay any specific sum of money, but admitted that he told the plaintiff's wife that he would help her as much as he could, as she was crying and stated that she needed money. The defendant denied that he was responsible for the injuries sustained by the plaintiff, and testified that the plaintiff ran into the automobile. The defendant was asked to tell the jury how the accident happened, but the plaintiff objected to this question, and the

[26] Accord: Wilkinson v. Buster, 124 Ala. 574, 26 So. 940 (1899); Carolina Interstate Building & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975 (1896).

See, however, the cases on pp. 245 and 250, infra, on the liability of the infant for such part of the proceeds of the loan as had actually been used to improve his property.

objection was sustained. The defendant testified that he was 20 years old at the time of the accident, and that he was driving the automobile.

The plaintiff brings this action ex contractu against the defendant for breach of his agreement to pay $10 a week during the time the plaintiff was unable to work on account of his injuries. The plaintiff claims that, as the defendant is liable to pay for the damages caused by his negligence, his promise to pay the sum agreed upon is enforceable, and cites the case of Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519, as an authority. In this case the plaintiff brought assumpsit upon a promissory note. The defendant pleaded infancy. The case was referred to a referee, who found that the plaintiff's horse, worth $250, had died from the effects of being overdriven by the defendant, and that the plaintiff accepted the note of the defendant for $125, in full settlement of his claim for damages. In sustaining a judgment for the plaintiff, the court said:

"The law makes him [infant defendant] liable for his torts; and where he elects to settle such liability by giving his note, as long as the consideration for the note is open to inquiry, we see no reason why he should not be held liable in an action upon the note, to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. The note in suit having been given in settlement of a claim for which the defendant was liable, and no fraud nor imposition having been practiced in obtaining it, the plea of infancy is not available to defeat it."

In an action on a contract against a minor, he is liable to pay only what the necessaries furnished to him are reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessaries, the real value will be inquired into, and he will be held only for that amount. Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761, citing Earle v. Reed, 10 Metc. (Mass.) 387.

In the case of Ray v. Tubbs, supra, the consideration for the note was inquired into and it was found that the minor was liable in damages for causing the death of plaintiff's horse, and that the amount agreed to be paid by him in full settlement of the damages, as shown by his note, was a reasonable sum and for his advantage, and he was held liable thereon.

In the case at bar the defendant denied making the agreement and denied liability for the accident; but, assuming that he did make the agreement as the plaintiff claims and as found by the jury, there is no evidence to show that the defendant was liable for plaintiff's injuries nor that the amount agreed to be paid to settle the damages was a reasonable amount. In the absence of any testimony to prove these necessary elements of the plaintiff's case, the defendant's motion for a direction of a verdict should have been granted, and his exception to the denial of said motion is sustained.

The plaintiff may appear before this court if he shall see fit, on the

2d day of April, 1923, at 10 o'clock a. m. and show cause, if any he has, why an order should not be made remitting the case to the superior court, with direction to enter judgment for the defendant.[27]

SECTION 7.—RATIFICATION

NICHOLS & SHEPARD CO. v. SNYDER.

Supreme Court of Minnesota, 1900. 78 Minn. 502, 81 N. W. 516.

Action by the Nichols & Shepard Company against Ward Snyder. Judgment ordered for defendant, and plaintiff appeals. Affirmed.

COLLINS, J. The plaintiff (appellant) does not challenge the finding of the trial court that defendant was but 19 years of age when he executed and delivered to it the notes upon which this action was brought. Nor is it contended that the defendant has at any time expressly ratified the contract. But the contention of counsel is that a finding to the effect that at a certain time, while defendant was still a minor, he expressly repudiated the notes, and refused to pay the same, was without evidence to support it, and hence that the court erred in ordering judgment for defendant. The finding was abundantly sustained by the proofs, but even if the specific point made by counsel, namely, that the language used by defendant when he refused to make further payments was not inconsistent with an affirmance of the validity of the notes, was well taken, the order appealed from would have to be affirmed. The notes were given for a grain separator—a part of a threshing-machine outfit. As to the defendant the contract was voidable and executory —to be executed in the future by payment. In law there is a marked distinction and difference between the executed contract of an infant and his contract merely executory. The former is binding until it is disaffirmed or avoided; and the contracts considered in Goodnow v. Lumber Co., 31 Minn. 468, 18 N. W. 283, and Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541, are examples of this class, conveyances of land being involved in each case. But an infant's executory contract is without binding force until it is confirmed. If an infant is sued on his executory contract before or after becoming of age, and he has not confirmed it since his majority, he may set up his infancy as a perfect defense. 2 Beach, Mod. Cont. § 1344, and note. And this distinction between executed and executory contracts was recognized by this court in Johnson v. Insurance Co., 56 Minn. 365, 57 N. W. 934, and 59 N. W. 992, in which it was said: "The following propositions are well settled everywhere as to the rescindable contracts of an infant, and in that category we include all contracts except for nec-

[27] See Swoboda v. Nowak, 213 Mo. App. 452, 255 S. W. 1079 (1923).

essaries: First, that, in so far as the contract is executory on the part of the infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield." No disaffirmance of such a contract is necessary, and the infant can only be bound when, after attaining or arriving at his majority, he has confirmed or ratified it by some word, act, or deed. He may, after reaching full age, affirm his voidable contracts, so that he will be bound by them. Bish. Cont. § 937, and cases cited; 10 Am. & Eng. Enc. Law, 644, and citations in notes. There is no claim in this case that defendant, after becoming of age, ratified or affirmed the contract. He had previously disavowed the notes by refusing to pay, and from that time on he did not use, nor did he exercise any control over, the separator. It was at his father's house. He became of age in April, 1894, and in July or August following the plaintiff's agent took possession and sold it. Order affirmed.

TUPP v. PEDERSON.

Supreme Court of Minnesota, 1900. 78 Minn. 524, 81 N. W. 1103.

Appeal from district court, Polk County; William Watts, Judge. Action by Andrew Tupp against C. B. Pederson. Judgment for defendant, and plaintiff appeals. Affirmed.

PER CURIAM. This action is upon a promissory note. The defense was that defendant executed the note when only 20 years of age. It appears from the record that the action was commenced nearly 6 years after defendant became of age, and that defendant never did anything after becoming of age to disaffirm the contract. Appellant claims that the minor, within a reasonable time after becoming of age, should have disaffirmed the contract, and, if he did not so disaffirm by some specific act, he ratified by implication. The question here involved is controlled by the decision in the case of Nichols & Shepard Co. v. Snyder (decided at this term) 81 N. W. 516. Judgment affirmed.[28]

THOMPSON et al. v. LAY et ux.

Supreme Judicial Court of Massachusetts, 1826. 4 Pick. 48, 16 Am. Dec. 325.

Assumpsit on the promise of the wife before marriage. The defendants pleaded the infancy of the wife. The plaintiffs replied a ratification after she came of age and before her marriage.

The plaintiff, to prove a ratification, produced evidence that the wife,

[28] Accord: Tyler v. Fleming, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336 (1888); 1 Williston on Contracts, § 239. Cf. Edwards v. Carter, L. R. [1893] A. C. 360; Johnson v. Storie, 32 Neb. 610, 49 N. W. 371 (1891); Darlington v. Hamilton Bank of New York City, 63 Misc. Rep. 289, 116 N. Y. S. 678 (1909).

after she was of age and before her marriage, acknowledged she owed the money on the note, and said that she had not the means of paying it then, but that she would pay it as soon as she had the means, or as soon as she should be able.

On this evidence the defendants agreed to be defaulted; but, if it was insufficient to maintain the action, the default was to be taken off, and the plaintiffs were to become nonsuit.

PARKER, C. J., delivered the opinion of the Court. The authorities cited, especially the cases of Whitney v. Dutch [29] and Ford v. Phillips,[30] explicitly lay down the principle, that the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification after he comes of age.

Such a ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt,[31] as in the cases on the statute of limitations. A promise to pay, is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise, as, if the party should say, after coming of age, I do ratify and confirm, or, do agree to pay, the debt.[32]

But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened, or been complied with, before an action can be sustained. I ratify and confirm my promise, provided I receive a certain legacy, or if I succeed to a certain estate, or if I recover a certain sum of money, or if I draw a prize in a certain lottery, would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So an engagement or promise to pay when able is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an

[29] 14 Mass. 460, 7 Am. Dec. 229 (1817).

[30] 1 Pick. (Mass.) 202 (1822).

[31] Accord: Proctor v. Sears, 4 Allen (Mass.) 95 (1852); Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28 (1812); Hale v. Gerrish, 8 N. H. 374 (1876); International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912); nor from a partial payment of the debt or a payment of interest, after majority, Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290 (1927); International Text-Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (1912), and authorities cited therein.

But a renewal of a note after majority is of course a ratification. J. I. Case Threshing Mach. Co. v. Dulworth, 216 Ky. 637, 287 S. W. 994 (1926).

The filing, after majority, of a petition in bankruptcy listing a debt incurred during infancy, is not an affirmance of the debt. Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 A. 290 (1927), and cases there cited.

[32] The new promise need not be in any particular form. "When the minds of the contracting parties meet and they both understand that by what is said it is intended that it should be taken as an assumption of an obligation and a promise to pay, it is the equivalent of a promise in terms." Hatch v. Hatch's Estate, 60 Vt. 160, 13 A. 791 (1887).

But see Stimson, Am. Stat. Law, § 4147, that statutes in some states require ratification to be in writing.

income from some source which would enable the party to pay, would be sufficient.

The cases cited by the plaintiff's counsel are bottomed upon this principle. That of Martin v. Mayo [33] is thought to be of a different description, but we understand the court to have there explicitly admitted the principle, but to have decided that the words appended to the promise did not constitute a condition, but merely postponed the time of payment. If there was any error, which, however, we do not perceive, it was not in the principle adopted, but in the construction of the words of the promise.

Plaintiffs nonsuit.[34]

MERRIAM v. WILKINS.

Supreme Court of Judicature of New Hampshire, 1833. 6 N. H. 432, 25 Am. Dec. 472.

Assumpsit for goods sold and delivered. The cause was tried in the common pleas, at September term, 1833, and a verdict taken for the plaintiffs, subject to the opinion of this court, on the following case:

The goods mentioned in the declaration were sold, and delivered to the defendants by the plaintiffs, but at the time of sale Erastus Wilkins was an infant, under the age of twenty-one years. But to obviate the objection of his infancy the plaintiffs proved, that, after the commencement of this action, and after Erastus arrived at the age of twenty-one years, he declared that he would not take advantage of his infancy in the action.

RICHARDSON, C. J., delivered the opinion of the court.

We are of opinion that this action cannot be sustained against Erastus Wilkins. In Wright v. Steele, 2 N. H. 51, it was decided, that a promise made after the commencement of the action, and after the minor arrived at the age of twenty-one years, might be considered as a waiver of the defence of infancy so that the contract might be considered as valid from the beginning. But this view is sustained by no other authority, and cannot be reconciled with what must now be considered as settled principles of law on this subject.

It was supposed in that case that there was a close analogy between the case of a debt taken out of the statute of limitations by

[33] 10 Mass. 137, 6 Am. Dec. 103 (1813).

[34] Accord: Kendrick v. Neisz, 17 Colo. 506, 30 P. 245 (1892), semble; Proctor v. Sears, 4 Allen (Mass.) 95 (1852); Whitney v. Dutch, 14 Mass. 460, 7 Am. Dec. 229 (1817); Hale v. Gerrish, 8 N. H. 374 (1836). Compare these four cases to see how the courts have varied in their construction of the language, as to whether it was conditional or not.

a new promise, and a contract of an infant ratified by a promise made after he comes of age; and that this analogy was close enough to sustain that decision. But there is, in truth, no analogy between the two cases. In the case of the statute of limitations the new promise does not create a new cause of action, but shields an old one from the operation of the statute.

But in the case of infancy there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. 2 B. & C. 824, Thornton v. Illingworth; 1 Pick. (Mass.) 202, Ford v. Phillips.

The contract of an infant to pay for goods, sold and delivered to him, is, unless the goods are necessaries, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them, made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified.

In this case the plaintiffs may enter a nolle prosequi as to the infant, and take judgment on the verdict against the other defendant.[35]

EDGERLY v. SHAW.

Supreme Court of Judicature of New Hampshire, 1852. 25 N. H. 514, 57 Am. Dec. 349.

Assumpsit upon a promissory note, made by the defendant while an infant, payable to John Barker, or order, and by him indorsed to the plaintiff, without recourse. The declaration follows the usual form of declaring upon indorsed notes.

The plaintiff called Barker to prove a new promise after the defendant became twenty-one years of age. He testified that while he held and owned the note, he told the defendant, who is a joiner, that he was about having some work done, and he wished the defendant would come and pay him. The defendant answered that he was then engaged to others, but that at the end of six weeks he would come and work for him at a dollar a day, and thus pay him, or else he would pay him in money, but he never did any work for Barker. The defendant objected that this promise would not enable the plaintiff to maintain the suit, and a verdict was taken for the plaintiff, subject to the opinion of the court upon the exception.

GILCHRIST, C. J. * * * In the case before us, the defendant, on being asked by the plaintiff to pay, said that at the end of six weeks he would come and work for him, at a dollar a day, or else he would pay him the money. This was a qualified promise to pay,

[35] Accord: Freeman v. Nichols, 138 Mass. 313 (1885).

depending on a contingency. For the period of six weeks the defendant reserved to himself the right to pay in labor, at a dollar a day. During that time it was contingent whether his promise to pay the money would become binding, and until the expiration of that period, it was uncertain whether the original contract would be confirmed, or the alternative promise would be performed. Until the end of six weeks no action could be brought, either upon the old or the new contract; but after the six weeks had elapsed, after the right reserved by the defendant to pay in labor had ceased, the new promise to pay in money became absolute, and the old contract was absolutely confirmed, and the defendant was then liable to be sued upon either contract. It does not appear whether the action was brought before or after the expiration of the six weeks. We take it for granted, however, that it was brought after that time.

The effect of the new promise, after it became absolute, being to ratify and confirm the note, and to give it the same validity as if the promisor had been of legal capacity to make the note at the time of its date, it was from that time at least a good negotiable note, transferable according to its terms, and the action may well be brought in the name of the indorsee. Reed v. Batchelder, 1 Metc. (Mass.) 559. If an action had been brought upon the new promise, it must have been in the name of Barker, because that contract is not negotiable. * * *

Judgment on the verdict.[36]

EDMUNDS v. MISTER.

Supreme Court of Mississippi, 1881. 58 Miss. 765.

CHALMERS, C. J., delivered the opinion of the court.

Robert H. Edmunds, a young man of handsome estate, became of age on the 12th of July, 1859. He was already burdened with debts, contracted by him during minority, amounting to about $2,000, and on the 19th of March, 1860, without having theretofore done anything either in affirmance or in disaffirmance of these debts, he executed and placed on record a deed whereby he conveyed the bulk of his estate, real and personal, to his infant daughter, then two months of age, for and during the term of her natural life, leaving the reversion in himself. He declared at the time that he intended by the act to defeat the holders of claims contracted during his minority, as to the estate conveyed; but that he was unwilling to plead minority, and intended to pay the debts. How he was to pay them does not

[36] If the defendant pleads infancy to the suit on the original promise, the new promise may be used as a reply. West v. Penny, 16 Ala. 186 (1849); Hodges v. Hunt, 22 Barb. (N. Y.) 150 (1856). Observe, however, the different grounds on which the courts in these cases reached their conclusions. Cf. Bliss v. Perryman, 1 Scam. (Ill.) 484 (1838).

appear, nor did he then declare, though he now says that he intended to do so out of his wife's estate.

Edmunds continued to become more and more involved until his total indebtedness finally amounted to more than $9,000. Suits were eventually brought against him by his various creditors, and in these suits no attention seems to have been paid to any distinction between his debts, as to whether they were contracted before or after majority, or before or after the date of the conveyance to the daughter. It is certain, however, that the debts contracted between his arrival at majority and the date of the conveyance (a period of eight months) were trifling. The suits all ripened into judgments, no plea of minority having been interposed in any of them. Under sales made by virtue of these judgments, defendants have held the lands now sued for, during many years. The plaintiff is the daughter of Edmunds, to whom, when she was two months old, he conveyed a life-estate in the property, and she brings this action of ejectment to recover the lands and mesne profits. The conveyance to her is older than the judgments, through which defendants claim, but, being voluntary, is fraudulent and void if the holders of the demands against Edmunds for goods furnished during minority were legal creditors at the date of the conveyance. At the time the goods were furnished, Edmunds had a guardian; and in discussing the question at issue we shall assume, as indeed the law does in the absence of proof, that they were not necessaries in contemplation of law, nor furnished under such circumstances as that their reception, of itself, imposed a legal liability upon him. The executory contracts of infants for the payment of money, not for necessaries, impose no legal liability upon them. They furnish a sufficient consideration to support contracts thereafter made, so that if ratified in any way after majority they will be enforced; but they derive their vitality, not from the original consideration, but from the new promise or ratification. They can be ratified at common law only by an act or agreement which possesses all the ingredients necessary to a new contract, save only a new consideration. The contract made during minority will furnish the consideration, but it will furnish nothing more. All else must be supplied by the new agreement. A mere acknowledgment of the debt is not sufficient, but there must be an express promise to pay, voluntarily made; and this is true under the common-law authorities, without reference to the provisions of our statute, which declares that the new promise or ratification must be in writing. Code 1857, p. 360, art. 8.

There cannot be said to be any contract in any legitimate sense of the term until after the act of ratification, or until after the written promise under our statute. Before ratification, it is wholly unilateral in its bearing; that is to say, the consideration has been advanced by the adult, but there is no corresponding legal liability upon the minor. It stands, not upon the footing of a debt barred

by the Statute of Limitations and afterwards revived by a new promise, because in such a case there has always been an existing, unextinguished right, since limitation affects only the remedy, and not the right; but it is rather like a debt wiped out by a discharge in bankruptcy. In such case there is no existing debt, but there is an outstanding consideration which will support a new contract. This is the illustration used in Hodges v. Hunt, 22 Barb. (N. Y.) 151, and in Taft v. Sergeant, 18 Barb. (N. Y.) 320. It is an anomaly in pleading that the plaintiff declares upon the original contract, and to a plea of infancy replies the new promise, while all the authorities declare that the recovery is not upon the original contract, but upon the new promise; and yet undoubtedly the anomaly exists. While this is true, it is clear that if the declaration should set out the whole facts,—that is, if it showed that the articles were furnished to a minor, that they were not necessaries, and that there had been no new promise,—it would be demurrable; or if judgment by default was taken upon it, it would be reversed upon appeal. The reason is that it would show no cause of action, and it would show no cause of action because of the absence of a new promise. It is the new promise, therefore, that makes the debt, and without it there is none. Tylor on Inf. & Cov. § 46 et seq., and authorities cited.

It follows, from these well-settled principles, that the holders of claims against Edmunds which were for articles, not necessaries, furnished during minority and not ratified after majority, were not legal creditors at the date of his conveyance, and cannot predicate fraud of it, though it was voluntary.

If defendants can show that the judgments through which they hold embraced, in whole or in part, debts created after the attainment of majority, and before the date of the conveyance, or were in whole or in part for necessaries furnished during minority, under circumstances which imposed a legal liability upon the infant, they can successfully resist plaintiff's demand, but the burden of doing this rests upon them; and while there is something to suggest that debts contracted after the disability of minority had ceased, and before the execution of the conveyance, may have entered into some of the judgments, this does not clearly appear. The ruling of the court below rendered any such showing upon the part of the defendants unnecessary.

The learned judge, adopting the view that minority was a personal privilege, which could not be set up by any one but the minor, and that he could only do so by pleading it when sued, excluded all testimony as to the debts having been contracted during minority; and this was at once an end of plaintiff's case.

He confounded therein the executed and the executory contracts of infants, and seems to have been partly, at least, led into this error by the course of counsel, who respectively contended, the one, that the making of the deed to the daughter was a disaffirmance of the

minority debts, and the other, that it was not. But it is not a question of disaffirmance, but of affirmance. Executed contracts of infants must be disaffirmed or they will become obligatory; executory contracts must be affirmed or they will be null. Until affirmed, they impose no liability. There was no pretence of affirmance here, and no act of disaffirmance was necessary.

True, when sued, Edmunds failed to plead minority, and judgments went against him. From the rendition of those judgments, and not until then, the claims of the creditors became valid debts against him; but he had several years before made the conveyance to his daughter, and it was not possible for him, by then making the debts valid, to affect the title previously conveyed. It is well settled that suffering judgment to go upon a debt barred by the Statute of Limitations will not affect the title to property sold before judgment, and after the bar was complete; and a fortiori must this be true as to minority debts, which have no binding force until judgment.

Whether the principle would apply, as to the Statute of Limitations, where the conveyance was unsupported by a valuable consideration, we have not found settled by adjudication; but certainly it must as to the unratified minority debts of an infant, since as to them there is no legal indebtedness.

Neither the research of counsel nor our own has discovered any adjudicated case similar in its facts or wholly analogous in principle to the one at bar; but we feel satisfied that the general principles controlling the liabilities of infants must lead to the conclusion here reached.[37] * * *

ANDERSON v. SOWARD.

Supreme Court Commission of Ohio, 1883. 40 Ohio St. 325, 48 Am. Rep. 687.

The plaintiff in error filed his petition in the common pleas and alleged: That said defendant executed and delivered to him on the 12th day of February, 1868, his certain promissory note of that date, a copy whereof with all endorsements thereon is hereto attached and made part of this petition, and thereby promised to pay to the order of said plaintiff the sum of thirty dollars within one day from and after said date. Said note is long past due and no part thereof has been paid, except the sum of ten dollars on the 17th day of June, A. D. 1868, and on said 17th day of June, 1868, defendant promised to pay the balance due on said note, and there is due thereon from said defendant to the plaintiff the sum of $20.63, with interest from June 17th, 1868, wherefore plaintiff prays judgment against said defendant for the sum of $20.63, with interest from June 17th, 1868,

[37] Contra: Palmer v. Miller, 25 Barb. (N. Y.) 399 (1857).

to which the defendant answered: That at the time said note is alleged to have been given, to wit: February 12th, 1868, he was a minor, that he was under 21 years of age, and that he made the payment of ten dollars on said note without the knowledge that he was not legally liable on said note. That he was 21 years of age on the 21st day of March, 1868.

The plaintiff demurred to this defense and the court overruled the demurrer. The plaintiff failing to reply, judgment was given for the defendant. This judgment was affirmed by the district court, and to reverse both judgments a petition in error is filed here.

McCauley, J. The contracts of an infant generally are not void, but only voidable. Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496; Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. There is nothing in the case to show that the note set forth in the petition is such as should be held to be void. It is conceded that the contract is one that might be ratified by the minor after his majority, and that the part payment of the note and the promise alleged in the petition amount to a ratification, unless it was necessary that the defendant when he made the payment and promise, knew that his infancy when the note was given, was a defense in law to an action on the note.

Counsel for defendant in error refer to Hinely v. Margaritz, 3 Pa. 428; Curtin v. Patton, 11 Serg. & R. (Pa.) 311; Reed v. Boshears, 4 Sneed (Tenn.) 118; Norris v. Vance, 3 Rich. Law (S. C.) 168; Owen v. Long, 112 Mass. 428; Fetrow v. Wiseman, 40 Ind. 148; Harmer v. Killing, 5 Esp. 102; and many other cases in which it is claimed this knowledge has been held to be necessary to a ratification. An examination of all these cases and many others in which the rule as claimed, is in some way recognized, shows that in one case only, that of Hinely v. Margaritz, has the rule been held. In no one of a great number of cases in which it is stated as the law, or in some way referred to, was the rule involved or in any way pertinent to the case. The necessity of such knowledge has been stated as the law, in numerous text books, as an exception to the rule that a promise to perform a contract made with knowledge of the facts which make a defense waives the defense. As in Rindskopf v. Doman, 28 Ohio St. 516; Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Fowler v. Brooks, 13 N. H. 240. But no one of those thus stating the rule has attempted to give any reason why this knowledge should be necessary to affirm a contract made in minority, when it is conceded not to be necessary to waive a defense in any other case.

In many, or all of the cases above referred to, it is stated that a ratification made with knowledge that minority was a defense, was complete and binding. If a promise without this knowledge was sufficient, the knowledge superadded would not detract from the affirmance. But in Morse v. Wheeler, 4 Allen (Mass.) 570, and Taft v.

Sergeant, 18 Barb. (N. Y.) 320, the necessity of such knowledge was directly involved and in both cases it was held that a contract could be affirmed by a promise to pay after majority, whether it was known or not that minority was a defense. We assent to the rule stated in these cases, that a ratification after majority is a waiver of a purely personal privilege, and that the general rule, that a new promise made with knowledge of the facts which make a defense, waives the defense, is quite as applicable to a case of this kind as to any other.

Judgment reversed.[38]

WAPLES v. HASTINGS.

Superior Court of Delaware, 1842. 3 Har. 403.

Judgment confessed on bond and warrant of attorney, dated 18th of February, 1836. On the application of defendant, rule to show cause why the judgment should not be vacated, on the ground that the defendant was an infant at the date of the bond and warrant of attorney.

At the hearing it appeared that the defendant was born on the 24th of April, 1816. He was acting as a man of full age in 1836, doing business as a partner with his father; generally understood to be of age, and voted at the general election in that year. In March, 1840, he executed a paper under hand and seal, expressly to recognize and confirm this bond and warrant of attorney given to William D. Waples, in February, 1836. The judgment was confessed on the 23d of February, 1836.

BY THE COURT. The bond and warrant of attorney of an infant are void. 3 Com. Dig. Enfant, B.; Co. Litt. 172, a.

The court, on motion, will set aside a judgment on a warrant of attorney executed by an infant. 3 Com. Dig. Enfant, B.; 2 Wm. Blac. 1133; 1 H. Black. 75, Saunderson v. Marr.

Even if the contract could be confirmed after full age, it would not set up the warrant of attorney. 9 Eng. Com. Law Rep. 256, Thornton v. Illingsworth.

The bond and warrant of attorney failing, the judgment is without authority and must be vacated.

The cases of suits against femes covert as femes sole, have only decided that the court will not permit the defendant to set up her coverture in a summary way, but put her to plead the coverture.

Rule absolute.[39]

[38] Accord: Rubin v. Strandberg, 288 Ill. 64, 122 N. E. 808, 5 A. L. R. 133 (1919).

Cf. Davis v. Kerr, 17 Canada Sup. Ct. 235 (1889); Healy v. Kellogg (Sup.) 145 N. Y. S. 943 (1914); Miller v. McAden (Tex. Civ. App.) 253 S. W. 901 (1923).

[39] Accord: 1 Williston on Contracts, p. 444, § 31. Contra: Krickow v. Penn. Tar Mfg. Co., 87 Ill. App. 653 (1899).

COURSOLLE v. WEYERHAUSER.[40]

Supreme Court of Minnesota, 1897. 69 Minn. 328, 72 N. W. 697.

Action to determine adverse claims to 320 acres of land. The defendants claim under a conveyance made in 1874 by the attorney in fact of an infant to one Brown and mesne conveyance from him. The power of attorney was executed in 1870, when the infant was 20 years of age. The plaintiff claims under a deed by the same infant when he attained the age of 28 years.[41]

MITCHELL, J. [after holding that the infant grantor had ratified and confirmed the conveyance to Brown, made pursuant to the power of attorney of 1870, so far as the same was capable of ratification, continued:]

The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains—which to our minds is the most important one in the case—whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see

40 Since this is not a case of infancy as a defense, it does not in strict logic belong here. However, the general question of whether the acts done by an infant's agent are subject to ratification has a bearing upon the subject of this chapter. Ed.

41 This statement is constructed from the omitted portion of the opinion.

why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's note to Craig v. Van Bebber (Mo. Sup.) 18 Am. St. Rep. 629 (s. c., 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569); Schouler, Dom. Rel. § 406; Ewell's Lead. Cas. 44, 45, and note; Bishop, Cont. § 930; Metcalf Cont. (2d Ed.) 48; Whitney v. Dutch, 14 Mass. 457–463, 7 Am. Dec. 229; Bool v. Mix, 17 Wend. (N. Y.) 119–131, 31 Am. Dec. 285.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority. * * *

Judgment affirmed.[42]

BUCK, J. I dissent from the result arrived at in the foregoing opinion.

HARNER v. DIPPLE.

Supreme Court of Ohio, 1876. 31 Ohio St. 72, 27 Am. Rep. 496.

Motion for leave to file a petition in error to the district court of Clarke county.

The original action was brought by Dipple against Harner on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that, after the expiration of the stay, he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed.

[42] Accord: Casey v. Kastel et al., 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924); 1 Williston on Contracts, p. 444.

Contra: Curtis v. Alexander (Mo.) 257 S. W. 432 (1923). See Mechem on Agency (2d Ed.) §§ 139–146.

In Rocks v. Cornell, 21 R. I. 532, 45 A. 552 (1900), it was held that a power of sale in a mortgage given by an infant was void, and not subject to ratification.

As to the liability of an infant for the torts of his agent, see note 5, p. 309, infra.

Upon this state of facts, judgment was rendered for the plaintiff in the court of common pleas; which judgment was afterward affirmed by the district court.

To reverse these judgments leave is now asked to file a petition in error.

McILVAINE, J. The question made is, Was the undertaking sued on absolutely void, or only voidable? If void, it was not subject to ratification; if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that, after ratification, it became a valid and binding engagement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed, it contained every element of a valid contract, save only that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defense. And it is contrary to our knowledge of human nature that all infants are incapable of intelligently and prudently entering into engagements and assuming burdens. It is a matter of favor, intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule which, in the nature of things, cannot affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity, to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and therefore he cannot disaffirm them. Contracts founded on illegal considerations are of no obligation, and therefore may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess—that of performing valid acts.

But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being coextensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not for want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, sui juris, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, sui juris, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship but the author, in speaking of the state of the authorities, pithily and truthfully remarks, "What contracts of an infant are void, and what are merely voidable, nobody knows."

Keane v. Boycott, 2 H. Black. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only, but in the opinion of C. J. Eyre a rule was stated, wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of the infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." This rule, modified so as to declare that a contract necessarily prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts, on account of their beneficial or prejudicial nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in Owen v. Long, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as matter of law, cannot be said to be necessarily prejudicial to the surety. Also an account stated is held to be voidable only. Wil-

liams v. Moor, 11 M. & W. 255. Also a conveyance by lease and release. Zouch v. Parsons, 3 Barrows, 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound. Curtin v. Patton, 11 Serg. & R. (Pa.) 305; Hinely v. Margaritz, 3 Barr. (Pa.) 428; Gatchin v. Cromack, 13 Ver. 330; Vaughan v. Parr, 20 Ark. 600; Shropshire v. Burns, 46 Ala. 108; Williams v. Moore, 11 M. & W. 256; Fetrow v. Wiseman, 40 Ind. 148; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Cole v. Pennoyer, 14 Ill. 158; Cummings v. Powell, 8 Tex. 80; 1 J. J. Marsh. 236; Mustard v. Wohlford's Heirs, 15 Grat. 329, 76 Am. Dec. 209.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134), it was afterward said by Chief Justice Parker, in Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229: "Perhaps it may be assumed as a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has legal capacity to make a contract, they are, in all respects, like contracts made by adults." And in 1840 (Reed v. Batchelder, 1 Metc. [Mass.] 559), Chief Justice Shaw said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that, Mr. Parsons, in his work on Contracts (6th Ed.) vol. 1, p. 294, says: "The better opinion, however, as may be gathered from the latter cases, cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he cannot ratify them after he arrives at the age of legal majority."

In 1 American Leading Cases (5th Ed.) p. 300, it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election, on arriving at majority." This rule has been quoted and approved in 14 Ill. 158, and 15 Grat. 329, and we think it embodies the better reason.

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be this resolved: The privilege of infancy is accorded for the protection of the infant from injury, resulting from imposition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult, laboring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think, is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should, in law, as in morals, be bound to their performance.

Motion overruled.[43]

BOYDEN v. BOYDEN.

Supreme Judicial Court of Massachusetts, 1845. 9 Metc. 519.

Assumpsit for goods sold and delivered, and on the money counts. Writ dated March 2d, 1843. At the trial in the court of common pleas, before Williams, C. J., the plaintiff gave in evidence a promissory note for $44, given to him by the defendants on the 12th of April, 1838. The defence was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th, 1818, and the other August 11th, 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty-one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

SHAW, C. J. The questions as to what contracts of an infant are

[43] In Beam v. Beatty, 4 Ont. L. R. 554, 6 British Ruling Cases, 109 (1902), the court held that an infant's bond with penalty is void and not subject to ratification, and said there was no English authority contra.

void, and what voidable, and, in the latter case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, ab initio, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it,[44] such detention, use or disposition—which can be conscientiously done only on the as-

44 Accord: Cases of sales, after majority, of chattels or land for which the promise sought to be enforced was given during infancy. Shropshire v. Burns, 46 Ala. 108 (1871), sale by administrator; Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538 (1889); Deason v. Boyd, 1 Dana (Ky.) 45 (1833); Robinson v. Hoskins, 14 Bush (Ky.) 393 (1878); Lawson v. Lovejoy, 8 Greenl. (Me.) 405, 23 Am. Dec. 526 (1832); Hubbard v. Cummings, 1 Greenl. (Me.) 11 (1820); Uecker v. Koehn, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849 (1887), case of mortgage also; Williams v. Mabee, 7 N. J. Eq. 500 (1849); Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84 (1830); Curtiss v. McDougal, 26 Ohio St. 66 (1875); Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735 (1825); Weed v. Beebe, 21 Vt. 495 (1849).

Cf. Miller v. McAden (Tex. Civ. App.) 253 S. W. 901 (1923); Hobbs v. Hinton Foundry, Machine & Plumbing Co., 74 W. Va. 443, 82 S. E. 267, Ann. Cas. 1917D, 410 (1914).

In the following cases it was held that an acceptance, after coming of age, by the late infant, of the consideration of a contract, or any part thereof, would preclude his defense of infancy: Smith v. Low, 1 Atk. 489 (1739), accepted rent after coming of age; Franklin v. Thornebury, 1 Vern. 132 (1682); La Cotts v. Quertermous, 84 Ark. 610, 107 S. W. 167 (1907); Scott v. Scott, 304 Ill. 267, 136 N. E. 659 (1922); Damron v. Ratliff, 123 Ky. 758, 97 S. W. 401, 30 Ky. Law Rep. 67 (1906); Highley v. Barron, 49 Mo. 103 (1871); Jones v. Phœnix Bank, 8 N. Y. 228 (1853).

sumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of the opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See Boody v. McKenney, 23 Me. 517.

Exceptions overruled.[45]

CALLIS v. DAY.

Supreme Court of Wisconsin, 1876. 38 Wis. 643.

Appeal from the Circuit Court for Grant County.

Foreclosure of a mortgage. [Bradley conveyed land to the defendants Jeremiah M. Day and his wife, who were infants, by warranty deed, and the defendants mortgaged the land back to Bradley, by a mortgage of the same date as the deed, to secure $200 of the purchase money. The defendants, of age at the time of the suit, were in possession of the premises, claiming to own them. They pleaded infancy. The court held that the plaintiff was entitled to judgment of foreclosure; and, from the judgment rendered accordingly, defendants appealed.]

The court held that the plaintiff was entitled to judgment of foreclosure; and from the judgment rendered accordingly defendants appealed.

COLE, J. * * * The case of Lynde v. Budd[46] is quite analogous in its principal features to the one before us. There the infant, Budd, took a conveyance of land, and gave a bond and mortgage for

[45] Accord: Chattels. Thomasson v. Boyd, 13 Ala. 419 (1848); McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312 (1888), under statute; Philpot v. Sandwich Mfg. Co., 18 Neb. 54, 24 N. W. 428 (1885); Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617 (1833). Cf. Hobbs v. Hinton Foundry, Machine & Plumbing Co., 74 W. Va. 443, 82 S. E. 267, Ann. Cas. 1917D, 410 (1914).

Accord: Land. Williams v. Brown, 34 Me. 594 (1852); Ellis v. Alford, 64 Miss. 8, 1 So. 155 (1886); Henry v. Root, 33 N. Y. 526 (1865); Hook v. Donaldson, 9 Lea (Tenn.) 56 (1882); Mission Ridge Land Co. v. Nixon (Tenn. Ch.) 48 S. W. 405 (1897).

Cf. McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572 (1868), to the effect that an infant need not, after majority, abandon land upon which he had placed improvements during infancy in order to avoid ratification of the mechanics' lien for such improvements. Cf. Shipman v. Conrad, 97 Okl. 216, 223 P. 183 (1924). Cf. also McGreal v. Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. Ed. 326 (1896), infra, p. 245, as to a method of working out such a problem if the improvements actually increased the value of the land.

[46] 2 Paige (N. Y.) 191, 21 Am. Dec. 84 (1830).

part of the purchase money. The infant went into possession of the land, and continued in possession until after he became of age, and then conveyed the property to one Rouse. In an action to foreclose the mortgage, the question was raised, whether the grantee of the infant did not take the land discharged of the incumbrance. Chancellor Walworth says: "The contract with the infant in this case was not void, but only voidable at the election of the grantee when he became of age. He might then have relinquished the property to the grantor, and claimed back the money which had been paid at the time of the purchase. Willis v. Twambly, 13 Mass. 204. But by continuing in possession after he became twenty-one, and finally selling and conveying the land with warranty, he affirmed the contract."

The doctrine of these cases is both reasonable and just, and is decisive of the one before us. Treating the deed of the land and the notes and mortgage as parts of the same transaction, there can be no doubt that the contract was one quite beneficial to the infants. They have elected to affirm it by retaining the possession of the premises and claiming them as their own. It would be most inequitable to allow them to repudiate the notes and mortgage given for part of the purchase money and also to keep the land. In the language of Shaw, C. J., "If the infant, after coming of age, retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred." Boyden v. Boyden, [47] supra. The evidence in this case is abundant to show an affirmance of the original contract of purchase.

BY THE COURT. The judgment of the circuit court is affirmed.[48]

[47] 9 Metc. (Mass.) 519 (1845).

[48] Accord: Hubbard v. Cummings, 1 Greenl. (Me.) 11 (1820); Young v. McKee, 13 Mich. 552 (1865); Curtiss v. McDougal, 26 Ohio St. 66 (1875); Stephenson v. Naumann (Sup.) 195 N. Y. S. 768 (1922), where the mortgage was to a person other than the grantor in the deed, but was on the same day, and was treated as a part of the same transaction; Ready v. Pinkham, 181 Mass. 351, 63 N. E. 887 (1902), where the mortgage was to a third person to secure a loan of money used in building a house on the premises, the whole arrangement having been made before the conveyance. See, however, Thurston v. Nottingham Permanent Benefit Building Society, L. R. [1903] A. C. 6.

Where a conveyance is made to an infant upon a condition precedent, the infant must perform the condition in order to acquire the title. Elder v. Woodruff Hardware & Mfg. Co., 9 Ga. App. 484, 71 S. E. 806 (1911); Bennett v. McLaughlin, 13 Ill. App. 349 (1883).

In Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654 (1870), it was held in foreclosure proceedings that the late infant was not liable on a contract to assume to pay the mortgage debt when she took title from the original mortgagor—she having conveyed before coming of age—although she had used and enjoyed the proceeds of sale after arriving at majority.

CHAPTER 2

INFANCY AS THE BASIS OF A RIGHT TO DISAFFIRM CONVEYANCES AND EXECUTED CONTRACTS, AND RECOVER THE CONSIDERATION

SECTION 1.—TIME AND MANNER OF DISAFFIRMANCE OF CONVEYANCES AND EXECUTED CONTRACTS—WHO MAY DISAFFIRM

STAFFORD v. ROOF.

Court for the Correction of Errors of the State of New York, 1827.
9 Cow. 626.

[Trover for a horse. On the trial it appeared that the plaintiff while an infant sold the horse to the defendant. The defendant paid the price and the plaintiff was still an infant.

The defendant moved for a non-suit on the ground, among others, that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled. The court charged that the plaintiff below had a right to bring his action while yet an infant. To this ruling and charge the defendant excepted. Verdict and judgment for the plaintiff. The defendant brought error to the Supreme Court, which reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Error was brought to the Court for the Correction of Errors.]

JONES, Chancellor, said, it is true in general that the deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for

taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land [1]; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of Zouch v. Parsons, 3 Burr. 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter,[2] and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Beside, in this case the infant had a general guardian. It may well be doubted whether he could make any contract of sale which should bind him, for any purpose, during his wardship.

[Other opinions omitted.]

By a majority vote the judgment of the Supreme Court was reversed.[3]

[1] Accord: McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418 (1882); Welch v. Bunce, 83 Ind. 382 (1882); Irvine v. Irvine, 5 Minn. (Gil. 44) 61 (1861); Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285 (1837); Cummings v. Powell, 8 Tex. 80 (1852).

Cf. Gillmett v. Tourcott, 213 Mich. 617, 182 N. W. 128 (1921).

[2] Matthewson v. Johnston, 1 Hoff. Ch. (N. Y.) 560 (1840).

[3] Accord: Towle v. Dresser, 73 Me. 252 (1882); Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924). Contra: Lansing v. Michigan Central R. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567 (1901).

EDGERTON v. WOLF.

Supreme Judicial Court of Massachusetts, 1856. 6 Gray, 453.

[Tort for the conversion of a horse. At the trial it appeared that the defendant Wolf was a minor, and after purchasing the horse from the plaintiff had returned it to the plaintiff, and had thereafter taken the horse from the plaintiff and sold it. The other defendant, Crafts, subsequently had possession of the horse. The sale by the infant and the possession of Crafts, were the acts of conversion complained of.

The defendants contended that if the sale from the plaintiff to Wolf was absolute it vested the property in Wolf, and a re-sale or return of it by him to the plaintiff, even if voluntarily made, was a voidable act and was avoided by Wolf's re-taking the property and selling it. But the court refused so to rule and instructed the jury "that, if Wolf had the property of the plaintiff, and afterwards voluntarily returned it to him, intending to give up all his interest in it to him, and the plaintiff accepted and took possession of the property, such surrender would restore the title to the plaintiff, and the plaintiff could not afterwards lawfully retake the property and sell it." The defendant excepted to the charge and the jury returned a verdict for the plaintiff.]

DEWEY, J. [after deciding other questions, continued:]

3. The remaining exception is to the ruling of the court that, if Wolf received the property of the plaintiff under a contract of sale, but afterwards voluntarily returned it to the plaintiff, intending to give up all his interest in it, and the plaintiff accepted it, such surrender would restore the title to the plaintiff, and Wolf could not afterwards lawfully retake the property and sell it. Looking at the precise state of facts as developed in this case, we have no doubt of the correctness of the ruling. Wolf, a minor, had, as he alleged, bought the horse of the plaintiff; but the contract was that of a minor, and so voidable at his election. This he might do as well against, as with the consent of the plaintiff. The case finds that he did thus voluntarily return the horse to the plaintiff, intending to give up all his interest in the property. The case is none the worse for the plaintiff, because he assented to this act of avoidance and return of the property by Wolf. The sale, which was voidable, was thus avoided by the infant, and all the rights of the vendor revested in him. Wolf had thus effectually availed himself of any privilege which attached to his minority, and the contract was no longer in force. With the surrender of the property to the plaintiff, intending to give up all his interest in it, he ceased to have any right over the property, and could not retake the same against the will of the plaintiff.

Exceptions overruled as to Wolf.[4]

[4] Accord: Skinner v. Young, 106 Mo. App. 615, 81 S. W. 464 (1904). See, also, Pippen v. Mutual Benefit Life Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505 (1902).

O'DONOHUE v. SMITH et al. (two cases).

KELLY v. SAME.

Supreme Court, Appellate Division, First Department, 1909. 130 App. Div. 214, 114 N. Y. S. 536.

Actions by Thomas J. O'Donohue, Jr., and Mary L. Kelly and by John J. O'Donohue against Adele Smith and others as executors. From judgments of the Special Term (57 Misc. Rep. 448, 109 N. Y. S. 929), dismissing the complaint in each case, plaintiff in each case appeals. Modified and affirmed.

SCOTT, J.[5] In each of these actions the plaintiff asks a judgment annulling a deed made by him or her during infancy and without consideration. From a judgment dismissing the complaint upon the merits, each plaintiff appeals.

The actions arise upon identical facts, except the ages of the respective plaintiffs at the time the deeds attacked were executed. Hugh Smith died July 16, 1890, leaving a last will and testament, wherein after providing an amount of $1,200 per annum for his brother, Henry A. Smith, he gave a life estate in his whole property to his sister Catherine T. Smith, the estate, consisting, among other things, of two valuable pieces of real estate. Upon the death of his sister Catherine, he gave one half of his estate to his sister Margaret C. Smith, and the other half to the children of his deceased sister, Mary Ann Murphy, one of whom was Louisa A. O'Donohue, the mother of these plaintiffs. The gift to her was in the following words:

"I give, devise and bequeath one other equal undivided fifth part of the rest, residue and remainder of my estate unto my niece Louisa A. O'Donohue, wife of Thomas J. O'Donohue, to have and to hold unto her, her heirs and assigns forever, and if she should die before my said sister Catherine, then I give, devise and bequeath the one fifth part to the issue of the said Louisa to be equally divided between them share and share alike."

Louisa A. O'Donohue died on November 13, 1904, during the lifetime of Catherine T. Smith, leaving her surviving these three plaintiffs, her children, each of whom thereupon acquired a vested remainder in one-fifteenth of the real estate of which Hugh Smith died seised, subject to the life estate of Catherine T. Smith. By deeds dated May 20, 1895, and acknowledged June 5, 1895, each of the plaintiffs conveyed to Henry A. Smith one-fourth of the grantor's right, title, and interest in the real estate of which Hugh Smith died seised. Henry

[5] Only a portion of the opinion of Scott, J., is given. All of the dissenting opinion of Houghton, J., which did not discuss the question involved in the portion of the case here printed, is omitted. The court said, in an omitted portion of the opinion, that the commencement of these actions constituted a disaffirmance. It would seem, then, that another action could be immediately commenced, which would succeed. Accord: Riggs v. Fisk, 64 Ind. 100 (1877).

A. Smith died July 27, 1903, leaving a will by which, after certain legacies, he left all of his estate to the Van Norden Trust Company, as trustee for the benefit of his widow, and his daughter Marie D. Heilmann. Catherine T. Smith died April 11, 1906, when each of the plaintiffs became vested in fee of the property in which he or she had theretofore had only a vested remainder. These actions were commenced on April 25, 1906.

(1) John J. O'Donohue was born April 9, 1875, and became of age on April 9, 1896. (2) Mary Kelly was born April 10, 1876, and became of age on April 10, 1897. (3) Thomas J. O'Donohue, Jr., was born August 22, 1880, and became of age on August 22, 1901.

The defendants urge three objections to a recovery by the plaintiffs:

First. It is said that, in order to maintain an action by a grantor to set aside a deed executed during infancy, there must be a disaffirmance antecedent to the commencement of the action.

Second. That the complaint fails to state a cause of action because it does not allege that plaintiff is in possession, or who is in possession.

Third. That the action is barred by the statute of limitations, or, if no statute applies, by the lapse of time.

We think that the first objection is well taken. The very basis of a cause of action to cancel an executed contract by an infant is his disaffirmance after arriving of age. Therein it differs from an executory contract, which does not become valid unless affirmed. Beardsley v. Hotchkiss, 96 N. Y. 201; Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930. Consequently, in the case of an executed contract like a deed, it is an essential element of a cause of action to revoke or cancel it that the plaintiff has since he came of age disaffirmed the deed; for, unless he has disaffirmed it, no cause of action has arisen. There was held in Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285, an action of ejectment, wherein Judge Bronson stated as one of the questions involved in the case "Was it necessary for the plaintiff to do any act to avoid the deed before bringing the action?" and he held that it was, saying after a full discussion of the authorities:

"If one who has aliened his estate while an infant wishes afterward to avoid the consequence, it is imposing no unreasonable burden to require that it shall be done by an entry on the land, or by some other act of equal notoriety, and the avoidance, whatever its form, must precede the bringing of an action to recover possession. Justice to the tenant requires it, and there is no other way in which we can carry out the doctrine that the deed of an infant is voidable only, and not void."

The same rule was stated and applied in Dominick v. Michael, 4 Sandf. 374, and again in Voorhies v. Voorhies, 24 Barb. 150, wherein the court said:

"It is also clear that, before suit can be brought for the recovery of the possession of lands conveyed in infancy, the party must make an entry upon the lands and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed,

such as demanding possession, or giving notice of an intention not to be bound by the first deed, or an action cannot be maintained (citing cases). In the latter case (Dominick v. Michael) it was said, as seems to be clearly correct upon principle, that under the present system of pleading this act of disaffirmance must be averred and is necessary to be proved. I think the want of this allegation makes the complaint fatally defective."

No case to the contrary is to be found in the reports of this state, where the question has been presented. Voorhies v. Voorhies has been cited in Eagan v. Scully, 29 App. Div. 617, 51 N. Y. S. 680, and in Green v. Green, 7 Hun, 494. In both cases the plaintiff had before suit brought performed acts of disaffirmance, and in the latter case, when in the Court of Appeals (69 N. Y. 553, 25 Am. Rep. 233, Bool v. Mix), is expressly cited. The same rule seems to have been applied in some other jurisdictions (Long v. Williams, 74 Ind. 115; Doe v. Abernathy, 7 Blackf. [Ind.] 446; Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539), while in others it is held that the commencement of a suit to avoid the deed is a sufficiently timely disaffirmance.[6] We conclude, therefore, that the complaints were defective, in that they alleged no act of disaffirmance before action brought. * * *

It follows that the judgment should be modified by striking out the words "on the merits," and, as thus modified, should be affirmed, with costs.

McLAUGHLIN, J., concurs. PATTERSON, P. J., and LAUGHLIN, J., concur in result. HOUGHTON, J., dissents.

DRAKE'S LESSEE v. RAMSAY.

Supreme Court of Ohio, 1831. 5 Ohio, 251, 253.

Ejectment. Mrs. Drake had executed a deed while an infant. In considering what is necessary to avoid an infant's deed, LANE, J., said:

"Some of the books apparently suppose that the act of avoidance must be equal solemnity with the act of grant. Rogers v. Hurd, 4 Day (Conn.) 57; Jackson ex dem. Brayton v. Burchin, 14 Johns. (N. Y.) 124. But I can not find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary; we believe that an entry, suit, or action, a subsequent conveyance, an

6 Accord: Tomczek v. Wieser, 58 Misc. Rep. 46, 108 N. Y. S. 784 (1908).

"But the plaintiff should not be dismissed. The law does not require an idle ceremony. * * * Notice of rescission where there is nothing to tender back may well be dispensed with where tender of benefits received might otherwise be insisted upon. Plaintiff had received nothing from Johnson and Wood. No substantial right would have been conserved by a prior disaffirmance of the title as to them." Pound, J., in Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924).

effort to restore parties to their original condition, or any act unequivocally manifesting the intention,[7] would render the avoidance effectual, and that the institution of, this suit is an act fully possessing this character." [8]

CRESINGER v. WELCH'S LESSEE.

Supreme Court of Ohio, 1846. 15 Ohio, 156, 45 Am. Dec. 565.

[Ejectment. Trial by jury. Verdict for the plaintiff, now defendant in error, and judgment accordingly. It appeared from the bill of exceptions that the plaintiff supported his title by a conveyance from Cyrus C. Lupton and William H. Lupton, dated April 15th, 1843. The grantors in said deed were over 21 years of age at that date. The defendant supported his possession and title by a deed from the same grantors, dated September 20th, 1832. The said grantors were not of age at that date. The defendant and those from whom he claimed, had been in possession and cultivated said land from the 20th day of September, 1832, and until after the execution of the deed of April 15th, 1843. There was no evidence of any act or expression by Cyrus and William, or either of them, disaffirming their deed of 1832 before the execution of the deed of 1843, nor of any claim or demand of possession, nor of any entry on the land or notice to the tenants prior to the beginning of this suit and service of declaration in this cause. Certain charges and refusal to charge, to which exceptions were taken by the defendant, appear in the opinion of the court.] [9]

HITCHCOCK, J. * * * 2. The court were next asked to charge the jury, "that the purchase by Welch, and receiving a deed from persons out of possession of lands in the actual adverse possession of persons claiming title, is an act of champerty and maintenance, illegal and void."

This instruction the court refused, and charged that such was not the law.

The question here presented is not one which now comes before the court for the first time. It is well known that, in England, a sale and conveyance of land by a person out of possession of land, the same lands at the time being in possession of another, claiming title, would be void, as being against the policy of the law. Whether this is a principle of the common law, or whether it is based upon some stat-

[7] Accord: McCarty v. Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136 (1890), written notice of repudiation of deed.

[8] Accord: Doe v. Woodruffe, 7 U. C. Q. B. 332 (1850); Slater v. Rudderforth, 25 App. D. C. 497 (1905); Chadbourne v. Rackliff, 30 Me. 354, 361 (1849); Webb v. Hall, 35 Me. 336 (1853); Clark v. Tate, 7 Mont. 171, 14 P. 761 (1887); Hoyle v. Stowe, 19 N. C. 320, 324 (1837); Birch v. Linton, 78 Va. 584, 590, 49 Am. Rep. 381 (1884).

[9] The statement of facts is constructed from the omitted part of the opinion.

ute, is a question which has been much controverted. But this is a matter of little consequence, so long as such is the law. In many, probably in most of the states of this Union, the same principle prevails; but in this state the decisions have, from the earliest period of our judicial history, been different, and such sales and conveyances have been held to be valid. This identical question was before this court in the case of Hall et al. v. Ashby et al., 9 Ohio, 96, 34 Am. Dec. 424; and the title acquired under such circumstances was held to be good. The case referred to is the first brought before the court in bank, in which this question was agitated, and the decision was merely in affirmance of what was understood to be the rule of law, as established by frequent determinations on the circuit. Now, I have no hesitation in saying that, in my opinion, the rule contended for by plaintiff's counsel would be beneficial, and highly conducive to the public interest. It would prevent the practice of purchasing doubtful titles. It might interfere with the interest of keen-sighted speculators, who make it a business to hunt up and purchase in such titles, but it could do no injury to the honest man. But although such is my opinion, still, acting in a judicial capacity, I can not consent to change the rule. Such change would interfere with a multitude of land titles heretofore acquired, and acquired, too, with a knowledge of the law as expounded by the court. But there is a body which can apply a remedy which shall operate hereafter; that body is the general assembly. And to me it is a matter of surprise that we have not an act upon our statute books, declaring void sales made under the circumstances referred to by counsel in their second request to the court. But until some statute of the kind is enacted, we feel ourselves bound by the law as heretofore settled.

3 and 4. The third and fourth instructions requested of the court, were, in substance, that the execution by Cyrus C. Lupton and William H. Lupton, of the deed to the defendant in error, did not, on their part, amount to a disaffirmance of the former deed to Kline, by them executed while infants. This the court refused to do, and held that such was not the law.

Much has been said in the books with respect to the deeds of infants conveying land, whether they were void or merely voidable. The better opinion, as we believe, is, that they are merely voidable; and it was so held in the case of Drake and Wife v. Ramsey et al., 5 Ohio, 251. Such being the law, the deed of an infant will hold good until some act has been done by him to avoid it, although there has been no express act of affirmance after his arrival at full age. But what the act of disaffirmance shall be, is a matter of more doubt. If it be one of equal solemnity with the original act of conveyance, it would seem to be sufficient. Thus, in England, if a feoffment be made by an infant, he can only avoid it by entry. He must be in possession in order to make the feoffment; for that is not done without livery of seizin. He must then again enter to avoid the feoffment; and per-

haps this alone would not be sufficient. But in this country, and especially in this state, this mode of conveyance is not adopted. Lands here are conveyed by deed of bargain and sale, and deeds of other descriptions. Livery of seizin is not known in practice, and is entirely unnecessary.

In the case of Drake and Wife v. Ramsey et al., before referred to, the judge, in delivering the opinion of the court, says: "Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant; but I can not find it to be expressly decided, except in cases of feoffments, where a peculiar feudal principle renders it necessary. We believe that an entry, suit, or action, a subsequent conveyance, an effort to restore the parties to their original condition, or any act unequivocally manifesting the intention, would render the evidence effectual," etc. It is said, however, that this question did not properly arise in that case, and, therefore, that this dictum of the court can not be relied upon as authority. It was the deliberate opinion of the court, in a case where one of the principal questions was, what act would amount to the avoidance or disaffirmance of a deed executed by an infant. True, the act relied upon in that case, and which was held to be sufficient, was the commencement of an action of ejectment. That a subsequent conveyance would amount to a disaffirmance, has been decided in the Supreme Court of New York and of the United States. Jackson v. Carpenter, 11 Johns. 541; Jackson v. Burchin, 14 Johns. 128; Tucker v. Moreland, 10 Pet. 59, 9 L. Ed. 345. In fact, I can not well conceive what would be a more decisive act of disaffirmance than the conveyance of the same land to another person. It would be conclusive evidence that the person making such conveyance, did not intend to be bound by his deed made in infancy. * * *

Judgment affirmed.[10]

BIRCHARD, J. (dissenting). The deed of a minor is universally held voidable, not absolutely void. Infancy is a personal privilege and can be taken advantage of only by the infant after arriving at years of maturity. He must do some act in avoidance of his deed, before the person occupying lands as the rightful owner, having entered under the deed, can be put in the wrong, and proceeded against as a trespasser. This position is not denied. It is admitted. Cresinger, and those under whom he claimed, had held and improved the land in their own right, as lawful owners, under the deed of the Luptons, executed during minority; and no act or movement had been made by them to disaffirm the deed, for near ten years. Welch, seeking to speculate, then applied to them for the purchase of a lawsuit; and they executed to him a

[10] Accord: Ison v. Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. Law Rep. 366 (1903), and see authorities therein cited.

An unconditional sale of personal property by the late infant after arriving at full age is sufficient to avoid a chattel mortgage made while the mortgagor was an infant. State v. Howard, 88 N. C. 650 (1883); State v. Plaisted, 43 N. H. 413 (1861); Chapin v. Shafer, 49 N. Y. 407 (1872).

quitclaim deed. By this decision now made, that act of putting their hands and seals to, and acknowledging the instrument before a magistrate in Baltimore, works the wondrous effect of changing the rightful possession of him who was the legal owner one moment before, into a tortious act, for which this court will maintain the action of trespass and ejectment. I can not believe that such is the law. Bool v. Mix, 17 Wend. 132, 31 Am. Dec. 285, is expressly against it; and in my judgment is a decision that will bear the strictest scrutiny, and be found sustained both by principle and authority. I refer to that case as a full exposition of my views upon the point wherein I differ from the other members of the court. It seems to me that their opinion makes the minor's deed, in substance, an absolute nullity; contrary to the admitted rule which I have firstly above stated. That it is at war with the second rule which I have stated, inasmuch as it permits other persons than the minor to take advantage of his minority; and that it is against good policy, inasmuch as it must tend to encourage a species of speculation that should be invariably discouraged, and which disturbs the peace of the community.[11]

BAGLEY v. FLETCHER.

Supreme Court of Arkansas, 1884. 44 Ark. 153.

SMITH, J. * * * Bagley filed this bill to quiet his title to a quarter section of land which he had acquired by purchase from Mrs. Rowland and her husband. The deed to Bagley is in the form of a bargain and sale, containing no covenants, however, except that the grantor was the owner of the land by virtue of a donation deed to her, as a married woman, by the State, and that she had never alienated or incumbered it. The bill stated that about eighteen months after the plaintiff had procured his title, the Rowlands, husband and wife, had conveyed the land by quit-claim to the defendant. And this was the cloud that was sought to be removed.

The answer set up that Mrs. Rowland was, at the date of the execution of her first deed, an infant. And the proofs showing that she was at that time only about seventeen years old, and that in six or seven months after attaining her majority she sold and conveyed the land to Fletcher, the Circuit Court dismissed the bill.

At the date of both conveyances the land was wild and unoccupied, and, as we may infer, of but little value. The consideration expressed in Bagley's deed is $50. And this sum was made up of $3 in cash, $3.70 in taxes refunded to Mrs. Rowland and the remainder was the estimated value of Bagley's services in looking up the title to the

11 Accord: With the view of Birchard, J., Harris v. Cannon, 6 Ga. 382 (1849); Murray v. Shanklin, 20 N. C. 431 (1839). Cf. Riggs v. Fisk, 64 Ind. 100 (1877), where the court held that the grantee in the deed made after majority could not sue the prior grantee in ejectment in his own name, but said he could sue in the name of his grantor.

land and procuring the donation to Mrs. Rowland. Fletcher paid $25 for his quit-claim, and he was advised that Mrs. Rowland had previously conveyed the land to Bagley. But he expressed his willingness to take his chances for getting the land and to protect Mrs. Rowland against all risks she might run by a second conveyance.

[The court then held that Mrs. Rowland's deed to Bagley was voidable at her election, and that a second conveyance by one after coming of age of land previously conveyed while an infant, operated as a disaffirmance of the first conveyance. The opinion then proceeds:]

Nor can any solid distinction, grounded on the form of Mrs. Rowland's deed to Fletcher, be taken as to the efficacy of that deed, considered as an act of disaffirmance. In England we understand the law to be that a deed of release can never operate technically as a conveyance per se, but only by way of enlargement of a previous estate. Consequently if the releasee was not in possession and had not some other interest in the land, he had no estate to be enlarged. But in this country a quit-claim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor, as a deed with full covenants, although the grantee has no possession of or prior interest in the land. It is almost the only mode in practice where the vendor does not wish to warrant the title. See article on the nature and effect of a quit-claim deed, in 12 Cent. Law Jour., 127, and cases cited; among others, Brown v. Jackson, 3 Wheat. 449, 4 L. Ed. 432; Kyle v. Kavanaugh, 103 Mass. 359, 4 Am. Rep. 560; Pray v. Pierce, 7 Mass. 381, 5 Am. Dec. 59; Jackson v. Fish, 10 Johns. (N. Y.) 456; Hall v. Ashby, 9 Ohio, 96, 34 Am. Dec. 424.

In fact, the covenants in a deed constitute no part of the conveyance, but are separate contracts. The title passes independently of them.

To say, then, that an infant can not disaffirm a previous contract of sale by executing a quit-claim deed after he comes of age, is equivalent to saying that he cannot disaffirm except on condition of warranting the title of the second grantee. None of the text-books or cases that we have consulted mention any such exception to the general rule, and we are unwilling to take so novel a position.

Bearing in mind that Mrs. Rowland was, at the date of the execution of the first deed, an infant and a married woman, and that she was not bound by the covenants contained in her deed (1 Bishop on Married Women, § 603; Benton County v. Rutherford, 33 Ark. 640), the two deeds were not essentially dissimilar. By the first the estate simply flowed from her, provided she did no act to defeat it after full age. But her covenants of seizin and against incumbrances were void. * * *

Decree affirmed.[12]

[12] Accord: Hetterick v. Porter, 20 Ohio Cir. Ct. R. 110 (1900).

MAD.D.R.

Mr. Chief Justice COCKRILL concurred.

EAKIN, J., dissenting. [After stating "that the conveyance after majority will not be a disaffirmance if it is compatible with any reasonable supposition that the grantor did not intend to recall the former right," he proceeds:]

I think, therefore, the question now in judgment can not be decided by the application of any cast-iron rule to the two simple facts, that Mrs. Rowland, as an infant, sold to Bagley, and then, as an adult, conveyed the same lands by quit claim to Fletcher. We must look deeper, and consider the circumstances of Fletcher's purchase and the nature of his conveyance, and find its solution in determining whether or not the quit claim to Fletcher is so wholly incompatible with the former sale to Bagley as to clearly manifest an intention on Mrs. Rowland's part to disaffirm Bagley's title.

It was effective to pass only the title Mrs. Rowland then had. Witter v. Biscoe et al., 13 Ark. 426. It charged Fletcher with full notice of all imperfections of the vendor's title and all equities against it, inasmuch as he did not pay full price for the land as the evidence plainly shows. Miller v. Fraley et al., 23 Ark. 735. It did not serve the ordinary purpose of a good and sufficient conveyance. Watkins v. Rogers, 21 Ark. 298.

It is not necessary that such deeds should have anything to operate on in order to make them sufficiently desirable to be worth getting at some trouble and expense. They do not imply, necessarily, that the grantor has any title. Operating innocently as to all other claimants, they only estop him. They quiet apprehensions and fortify against defects and irregularities, or lost instruments or lack of registration. They are frequently given and taken for peace. They can not be incompatible with any former alienations. It is common in some of the States to announce the general rule to be that a deed with covenants of warranty will be a disaffirmance of a conveyance made in infancy. That idea enters into the leading case on the general rule. Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345. Mr. Justice Story, speaking of the deed made after full age, says: "The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him, and a covenant that he had a good right and title to convey the same, and therefore is a positive disaffirmance of the former deed."

After a rather industrious search and inquiry, I have been unable to find a single case in which it has been held that a quit-claim deed, by its own force, will avoid a conveyance made in infancy. The opinion of the court seems to make it conclusively a disaffirmance. I think it should depend on intention, to be ascertained from the circumstances and nature of the second deed. It is enough for the protection of infants that they are allowed after age to disaffirm their conveyances.

They are not bound to do so, and I fear it will work injustice to make their acts have that effect, when they may not have intended it. In this case, I do not clearly see that Mrs. Rowland did so intend.[13]

PROUT v. WILEY.

Supreme Court of Michigan, 1873. 28 Mich. 164.

CHRISTIANCY, C. J. This was a bill to remove a cloud from the complainant's title to one hundred and sixty acres of land in Ingham county. The title, and the facts affecting it, as shown by the evidence, were as follows: Cornelius Cadwell, being then a minor, purchased the land at the United States Land Office, December 23, 1848, and on the 5th day of October, 1850, while still a minor (and only twenty years old in July of that year), sold and conveyed the land to George A. Wallace, for the consideration of one hundred and twenty-five dollars. * * * Shortly after the execution of the deed, in the spring of 1851, and while yet a minor, Cadwell left the state and went to California, and thence to Central America, and did not return to this state until the latter part of August, 1857. In the mean time, Wallace, on the 28th day of October, 1850, conveyed the land to one Phoebe Ann Skidmore, who, on the 14th of September, 1853, conveyed the same to one Charles Koegel, who was in possession of the land when Cadwell returned from Central America in 1857. In November, 1857, Cadwell, then living in Washtenaw county, some eighteen or twenty miles from the land, went and saw Koegel, informed him that at the time he made the deed to Wallace he was a minor, and that the deed was not good; but offered to give him a deed for seventy-five dollars in money. Koegel offered to pay him that amount in stock, which Cadwell refused, and Koegel said he would have the money the next May. Cadwell again called upon Koegel the next May for the money; but Koegel then refused to do anything about it, claiming that his title was good, whereupon Cadwell, as he testifies, caused a notice of ejectment to be served upon Koegel. Nothing further, however, appears then to have been done. In the winter of 1859 or 1860 Cadwell went and resided at Leroy in Ingham county, within two miles of the land, where he seems to have resided till the latter part of 1864 or the spring of 1865, when he removed to Williamston, in Ingham county, whence, in the spring of 1865, he was drafted into the army, and returned in September, 1865.

Some time between 1857 and 1865 (the exact date does not appear), Koegel died, leaving, as we infer from the evidence, a tenant in possession, who had gone in previous to his death. While Cadwell was in the army he was informed that this tenant had left the land and the premises were vacant, and he thereupon authorized one Lewis Havi-

[13] Accord: Shreeves v. Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396, 3 Ann. Cas. 592 (1904).

land, the son of Lewis J. Haviland, next mentioned, to take possession of the land for him; which he did, and continued in possession until June 1st, 1865, when Cadwell sold and conveyed the premises by warranty deed to Lewis J. Haviland, who took possession under his deed and remained in possession until December 17th, 1867, when he sold and conveyed the premises to complainant, who took and holds possession under his deed.

On the third day of November, 1865, some five months after Cadwell had conveyed to Haviland, and while the latter was in possession, the administrator on the estate of Koegel, in pursuance of a license from the probate court, sold the land, or the interest of the deceased therein, to the defendant Wiley, and the report of the sale by the administrator to the probate court (which was confirmed), states, among other things, that there was an adverse claim to the premises sold to said Wiley, and that another party claims to hold the same.

The amount of the improvement upon the land was small, being only about or a trifle over twenty acres, some of which was imperfectly cleared, and the buildings poor and of little value. Whatever of improvement there was upon the land seems to have been mostly made by Koegel, while Cadwell was absent in California and Central America, and if any were made after his return, they were made, so far as the case shows, after Koegel had received notice from Cadwell that he repudiated the deed, or did not intend to be bound by it. And there is no evidence in the case tending to show that Cadwell stood by, after his majority, when improvements were being made upon the land, without objections or notice, or that he was ever aware of any improvements going on upon the land. In our view, therefore, the case is disembarrassed of any question of estoppel upon this ground; and the only question in reference to the validity or effect of the minor's deed, is whether his neglect to make an actual disaffirmance of the deed, by entry or conveyance, until the time he undertook thus to disaffirm it, did, under the circumstances of this case, operate as an affirmance or confirmation of the deed executed during his minority; for, though the question has sometimes been raised whether the conveyance to another person after becoming of age, would, without entry, operate as a disaffirmance, there was here both an actual entry and a conveyance, which clearly operated as a disaffirmance, unless the delay which had previously occurred amounted to an affirmance, and cut off the right to disaffirm.

Upon this question of the affirmance of a deed executed during minority, by mere lapse of time, or in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable

estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose, it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time, might depend much upon the special circumstances of the particular case.

This distinction reconciles nearly, though not quite all of the decisions upon this subject.

In the present case, we can discover no grounds of equitable estoppel and no such special circumstances as can properly be held to change the question from that of simple delay or lapse of time in disaffirming the deed; and we must therefore hold that Cadwell had the right to disaffirm, to re-enter upon the land and to convey to Haviland; and that the complainant therefore obtained and holds the title, and is entitled to the relief he asks to remove the cloud created by the administrator's deed to the defendant.

But the complainant stands only in the place and succeeds only to the rights of Cadwell, who, while a minor, had conveyed to Wallace; and the defendant occupies the place and is entitled to the equities to which Wallace would have been entitled, had he not conveyed and Cadwell had sought to disaffirm the deed and convey the property. Neither complainant nor defendant has obtained any other rights or equities than would have existed between Cadwell and Wallace. And as the privilege of infancy is a shield for the protection of the infant, and not a weapon of attack, nor to be used as an engine for defrauding others, and he cannot, therefore, especially in a court of equity, be allowed to disaffirm and repudiate his deed and regain the property, without restoring the consideration he had received for it (there being no evidence of bad faith in Wallace in making the purchase). And as the complainant, standing in his place and clothed only with his rights, is compelled to ask the aid of the court of equity to remove the cloud upon his title, he should, I think, as a condition of that relief, consent to do equity to the other party. Hillyer v. Bennett, 3 Edw. Ch. 222; Locke v. Smith, 41 N. H. 346; Strain v. Wright, 7 Geo. 568; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Weed v. Beebe, 21 Vt. 495; 2 Kent's Com. 240.

But upon this point my Brethern do not concur in laying down the principle thus broadly, though my Brothers COOLEY and GRAVES concur in the result upon this point in the present case, on the ground that complainant makes no objection to the allowance to defendant of the amount of the consideration, and by implication admits its justice in the present case while my Brother CAMPBELL thinks the principle inapplicable, even upon this ground, without the clear and express assent of complainant, in a bill like this, to quiet title. * * *

A decree of this court should therefore be entered affirming the decree of the court below in favor of the complainant, on condition that complainant, within sixty days from this date, pay to the defendant the said sum of one hundred and twenty-five dollars, and with interest to the day of such payment; otherwise that complainant's bill be dismissed. with costs to defendant.

The other Justices concurred.[14]

GOODNOW v. EMPIRE LUMBER CO.

Supreme Court of Minnesota, 1884. 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

Appeal by defendants from an order of the district court for Winona county, Start, J., presiding, overruling a demurrer to the complaint, the substance of which is stated in the opinion.

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act to disaffirmance in case they then had the right to disaffirm,—and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed,—there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21,

14 Accord: Putnal v. Walker, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33 (1911); Parrish v. Treadway, 267 Mo. 91, 183 S. W. 580 (1916); Blake v. Hollandsworth, 71 W. Va. 387, 76 S. E. 814, 43 L. R. A. (N. S.) 714 (1912). See, also, Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87 (1880). But cf. Holcomb v. Pressley, 301 Mo. 208, 255 S. W. 1062 (1923).

In Chicago Telephone Co. v. Schulz, 121 Ill. App. 573 (1905), the court applied the same rule where the former infant was suing to enforce a claim for damages which he had released during infancy.

1863, and, as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so; and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that, even if the period of minority of plaintiffs were to be excluded, (and we doubt if it should be,) there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not, (where there are no circumstances other than lapse of time and silence,) and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: Vaughan v. Parr, 20 Ark. 600; Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Prout v. Wiley, 28 Mich. 164; Youse v. Norcum, 12 Mo. 549, 51 Am. Dec. 175; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Baker v. Kennett, 54 Mo. 82; Huth v. Car. Mar. Ry. & Dock Co., 56 Mo. 202; Hale v. Gerrish, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsay, 5 Ohio, 252; Cresinger v. Lessee of Welsh, 15 Ohio, 156, 45 Am. Dec. 565; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Ordinary v. Wherry, 1 Bailey (S. C.) 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt. 35; Dublin & W. Ry. Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Bostwick v. Atkins, 3 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. (N. Y.) 641; Kline v. Beebe, 6 Conn. 494; Wallace v. Lewis, 4 Har. (Del.) 80; Hastings v. Dollarhide, 24 Cal. 195; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Richardson v. Boright, 9 Vt. 368; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. Law (S. C.) 55, 64 Am. Dec. 760.

The rule holding certain contracts of an infant voidable, (among them his conveyances of real estate,) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace v. Lewis, "a dangerous weapon of offense, instead of a defense." For we cannot assent to the reason given in Boody v. McKenney, (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification,) "that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without unnecessary delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles,) and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to deter-

mine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. Cochran v. Toher, 14 Minn. 385, (Gil. 293;) Derosia v. W. & St. P. R. Co., 18 Minn. 133, (Gil. 119.) Three years and a half, the delay in this case, (excluding the period of plaintiff's minority, after the time within which to act had commenced to run,) was prima facie more than a reasonable time, and prima facie the conveyance was ratified.

Order reversed.[15]

WEEKS v. WILKINS.

Supreme Court of North Carolina, 1904. 134 N. C. 516, 47 S. E. 24.

Action for recovery of land. The land in controversy belonged to Hester Weeks for life with remainder to her eight children. In this state of the title and on June 1st, 1863, Hester and seven of her children, among whom was the plaintiff Sampson Weeks, then a minor, made a conveyance of the land in question. The defendant claimed the interest of the minor Sampson Weeks under this deed. Hester Weeks died July 10th, 1896, and this action was brought within three years thereafter. Further facts are stated in the opinion of the court. Judgment for the plaintiff. The defendant appeals.

CONNOR, J.[16] [after stating the facts]. We take it to be well settled in this State that the deed of an infant, operating as it does under our registration laws by transmutation of possession, is voidable and not void. Hogan v. Strayhorn, 65 N. C. 279; McCormic v. Leggett, 53 N. C. 425; Ward v. Anderson, 111 N. C. 115, 15 S. E. 933; Cox v. McGowan, 116 N. C. 131, 21 S. E. 108; Kent, Com. 236; 1 Devlin on Deeds, 86. We do not find in the record any evidence of acts on the part of Sampson Weeks amounting to an affirmance, and his Honor would have been justified in so saying to the jury. The institution of this action is a clear disaffirmance, as his Honor told the jury. The defendants, however, asked the Court to instruct the jury that such disaffirmance must be within a reasonable time after the plaintiff reached his majority. He was of the opinion, and so instructed the jury, that in view of the existence of the outstanding life-estate of Hester Weeks, the action brought within three years after her death was within the time prescribed by law. The defendants excepted, and this exception presents the question which must be decided by us.

This court has not, so far as the brief and argument of counsel and

[15] Accord: Nobles v. Poe, 121 Ark. 613, 182 S. W. 270 (1916); Merchants' Credit Bureau v. Kaoru Akiyama, 64 Utah, 364, 230 P. 1017 (1924), semble; Salser v. Barron (Tex. Civ. App.) 146 S. W. 1039 (1912), semble. See Combs v. Noble, 58 S. W. 707, 22 Ky. Law Rep. 736 (1900); Holcomb v. Pressley, 301 Mo. 208, 255 S. W. 1062 (1923). See Stimson, Am. Stat. § 6602, for statutes.

[16] Statement of facts abridged from that of the court in the opinion.

our own investigation show, decided the question as to when an infant, after arriving at his majority must disaffirm his deed. The only case approaching it is Dewey v. Burbank, 77 N. C. 260, in which it is said that after his reaching his majority he may avoid or confirm it, and that continuing to reside on the land and paying a part of the purchase-money (he being in that case the purchaser) amounts to an election to ratify. The author of Devlin on Deeds, vol. 1, § 91, after discussing the authorities says: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it." We think this is a just and reasonable rule. It is sustained by a large number of well-considered cases. Kline v. Beebe, 6 Conn. 494, in which Hosmer, C. J., says: "A ratification of the contract has often been inferred from the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration or availing himself in any manner of his conveyance. * * * The omission to disaffirm a contract within a reasonable time has been held sufficient evidence of a ratification." Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. Rep. 837. In Blankenship v. Stout, 25 Ill. 132, it is held that a conveyance of real estate by an infant must be disaffirmed within three years after his arrival of full age; Caton, C. J., saying: "It is of the greatest importance that the common assurances of the country be rendered as certain as possible. Purchasers should be able to know, after ascertaining the facts whether they can purchase a good title or not. * * * This end is essentially promoted by fixing a definite limit within which a conveyance made by an infant shall be repudiated after he attains his majority. Although the tenth section of the statute * * * does not in terms apply to such cases, yet we are disposed to adopt the limitation there prescribed for the bringing of an action by an infant after he attains his majority, as a reasonable time within which he should repudiate a conveyance of real estate executed by him while an infant." [17] Tyler on Infancy, 70. In Bigelow v. Kinney, supra, it was

[17] Accord: Cole v. Pennoyer, 14 Ill. 158 (1852); Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 (1874); Keil v. Healey, 84 Ill. 104, 25 Am. Rep. 434 (1876); Hogan v. Utter, 175 N. C. 332, 95 S. E. 565 (1918).

held that disaffirmance 11 years after majority was not within a reasonable time. Drake's Lessee v. Ramsay, 5 Ohio, 252.

While we have no statute fixing the time within which an infant is required to disaffirm his conveyance, we think that, upon the reason of the thing and in consonance with the policy of the law which seeks to quiet titles, and encourage improvement of real estate, the infant should exercise his election within a reasonable time. The statute gives him three years after arrival at majority within which to bring his action against a disseisor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed.

But it is said that Mrs. Hester Weeks owned the life-estate, and that pending such estate he had no right of action to sue for the possession of the land. We do not think this material. His right to disaffirm his deed was entirely independent of his right to the possession of the land.[18] He could easily have disaffirmed by returning the purchase-money or by some other unequivocal act which would have put innocent purchasers on notice. He could have brought his action to remove a cloud from his title under Acts 1893, c. 6. He was, according to his testimony, thirty-four years of age in 1894, and therefore reached his majority in 1881. At the time of the institution of this action he was thirty-nine years of age. He should, we think, have disaffirmed his deed within three years after he arrived at his majority.

The record before us illustrates the injustice which may be done by permitting an infant to remain quiescent for an unlimited time before doing some act which puts innocent purchasers on notice of a defect in their title. This land has been divided into five parcels and as many persons have purchased, paid for, and it seems some of them, with the knowledge of the plaintiff, have cleared and improved it. Eighteen years after his majority the plaintiff for a nominal consideration buys the interests of his brothers and sisters and brings this action—thus disturbing the rights of innocent purchasers and recovering not only the land but the rents and profits in excess of the amount paid by him for it. A stronger illustration of the wisdom of the law which seeks to quiet titles can hardly be found. His Honor should have charged the jury that the plaintiff Sampson Weeks could not recover in respect to his one-eighth undivided interest.

[Balance of opinion omitted.]

Error.

[18] Accord: Holcomb v. Pressley, 301 Mo. 208, 255 S. W. 1062 (1923). Cf. Nobles v. Poe, 121 Ark. 613, 182 S. W. 270 (1916).

MANSFIELD v. GORDON.

Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 168, 10 N. E. 773.

DEVENS, J. The plaintiff is the assignee of the estate of William A. Burrell, an insolvent debtor, and, by this bill in equity, seeks to relieve a parcel of land belonging to the estate from the incumbrance of a mortgage thereon, conditioned for the payment of a promissory note of $1000. The note and mortgage were executed by Burrell when under age. He is now of age, and was so when the insolvency proceedings were begun. Since his majority, he has not ratified the note and mortgage; nor is it alleged that he has done any act in disaffirmance thereof.

The assignment vested in the assignee, not only "all the property of the debtor, real or personal, which he could have lawfully sold, assigned, or conveyed," including debts due him and the securities therefor, but also "all his rights of action for goods or estate, real or personal." Pub. St. c. 157, § 46. "By the 'right of action' mentioned in the statute," it is said by Chief Justice Shaw in Gardner v. Hooper, 3 Gray, 398, 404, "the Legislature intended all valuable rights actually subsisting, whether absolute or conditional, legal or equitable, which were to be obtained by the aid of any species of judicial process."

It is the contention of the plaintiff, that, by virtue of this clause, he, as assignee, is entitled to exercise the privilege which the insolvent might have exercised on reaching his majority, and to disaffirm this mortgage, and thus is entitled to a decree relieving the estate therefrom.

That an individual creditor cannot attach property conveyed by a debtor while a minor, the conveyance of which such debtor might have disaffirmed, and thus avail himself of the infant's privilege, is well settled. McCarty v. Murray, 3 Gray, 578; Kendall v. Lawrence, 22 Pick. 540; Kingman v. Perkins, 105 Mass. 111. While the rights of an assignee are not always tested by those of an individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors. The contracts of an infant are voidable only, and not void; and it has often been said that the right to avoid his contracts is a personal privilege of the infant only, not to be availed of by others. Nightingale v. Withington, 15 Mass. 272, 274, 8 Am. Dec. 101; Chandler v. Simmons, 97 Mass. 508, 511, 93 Am. Dec. 117; 1 Chit. Con. (11th Am. Ed.) 222. It is said by Wilde, J., in Austin v. Charlestown Seminary, 8 Metc. 196, 203, 41 Am. Dec. 497: "Voidable acts by an infant, or matters of record done or suffered by him, can be avoided by none but himself or his privies in blood, and not by privies in estate; and this right of avoidance is not assignable." Bac. Abr. Inf. & Age, I, 6; Whittingham's Case, 8 Rep. 42b, 43a.

It is said that it is for the benefit of the debtor that the assignee

should be allowed to avoid his mortgage, as the assets of the estate are thus increased. The ground upon which an infant is allowed to avoid his contract is for his personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received, but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received. The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege, and that, as the rule permitting him thus to avoid his contract is established solely for his protection, so he alone can have the benefit of it.

Decree dismissing the bill affirmed.[19]

WATSON v. RUDERMAN.

Supreme Court of Errors of Connecticut, 1907. 79 Conn. 687, 66 A. 515.

Action by David F. Watson against John Ruderman. From an order sustaining a demurrer to the reply, plaintiff appeals. No error.

The complaint is one framed in the ordinary form of a foreclosure of a mortgage of lands. The defendant is described as the maker of the note and mortgage. The defendant pleaded infancy, alleging that at the time the note and mortgage were made by him, to wit, January 18, 1906, he was only 19 years of age. The plaintiff in his reply admitted these allegations of infancy, and then proceeded under the introduction "by way of equitable relief" to reaffirm by reference the allegations of the complaint, and further to allege, in substance, that on said January 18th the plaintiff sold and conveyed to the defendant the equity of redemption in the described premises, in consideration

[19] The right of disaffirmance may not be exercised by the infant's guardian. Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134 (1816); Shreeves v. Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396, 3 Ann. Cas. 592 (1904); Crymes v. Day, 1 Bailey (S. C.) 320 (1829). If the infant, after majority remains under guardianship as a spendthrift, his guardian may disaffirm. Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117 (1867).

The heir or personal representative of the infant may disaffirm. Harvey v. Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62 (1890); Linville v. Greer, 165 Mo. 380, 65 S. W. 579 (1901). See 33 A. L. R. 51. A devise in general terms, not mentioning the property previously conveyed, by the infant, after majority, does not give the devisee the right to disaffirm the previous conveyance. Bozeman v. Browning, 31 Ark. 364 (1876), but (semble) a specific devise of the property would be a disaffirmance by the devisor, of the previous conveyance. The heir has the same time within which to disaffirm which the infant himself would have had. Illinois Land & Loan Co. v. Bonner, 75 Ill. 315 (1874); Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411 (1885).

As to whether or not a third person may, without liability to the other party to the contract, induce an infant to disaffirm his contract of employment, see Keane v. Boycott, 2 H. Bl. 511 (1795); Di Francesco v. Barnum, L. R. 45 Ch. Div. 430 (1890).

of the assumption by the defendant of the mortgage of $600 already upon the property, $150 then paid in cash, and a note for $200 then made and delivered to the plaintiff by the defendant, which note was secured by a mortgage of said equity, also then executed and delivered by the defendant, said note and mortgage being those in suit; that the defendant has paid only $26 on account of said note, or of the prior assumed incumbrance; that there is located upon said premises a building since occupied by the defendant for the conduct of business; that the use of said property is reasonably worth $10 per month, and that the plaintiff is ready and willing to pay into court for the use of the defendant so much of the amount the defendant has paid as the court should find ought equitably to be repaid to him. The plaintiff thereupon claimed the following relief: "(1) A decree affirming said purchase, payment, mortgage, and note, and a judgment of foreclosure; or (2) a decree disaffirming said purchase, payment, mortgage, and note; and (3) a judgment fixing the amount which the defendant is equitably entitled to have paid into court for his use on account of said payment; and (4) a decree or judgment for a reconveyance of said property to the plaintiff, or otherwise vesting title thereto in him; (5) such other and further appropriate relief as to equity may appertain." The defendant thereupon demurred to said prayers for relief, for the reason that the facts stated did not entitle the plaintiff to the relief sought. This demurrer was sustained, and judgment for the defendant thereafter followed in due course.

PRENTICE, J. (after stating the facts). The plaintiff contends that the court's action in sustaining the demurrer to the reply was erroneous for reasons which in the brief of counsel are resolved into three, to wit: First, because, for the purposes of the demurrer, the defendant must be regarded as having waived the defense of infancy, since it was not therein specifically appealed to; second, because a foreclosure might have been properly awarded upon the facts set up; and, third, because equity might grant relief, either by compelling the infant defendant to elect to affirm or disaffirm the transaction, or by making such election for him and thereupon establishing what had in form been done, or, as the case might be, setting the same aside and restoring the parties to their former status. * * *

The plaintiff's argument in support of his second contention, that a foreclosure might have been granted, establishes nothing more than that a minor may be foreclosed. This is, of course, true; but the effort here is, not only to foreclosure a minor, but to do so upon a note and mortgage executed by such minor. The contract embodied in the note and the conveyance of title effectuated by the mortgage were alike voidable. The defendant, by the accepted rule of public policy, was entitled to disaffirm them. This disaffirmance might be exercised after the attainment of majority—a time still in the future—and in so far as the mortgage was concerned could not by the current of authority be sooner exercised. Kline v. Beebe, 6 Conn. 494, 503–505; Ship-

man v. Horton, 17 Conn. 481, 483; Bestor v. Hickey, 71 Conn. 181, 184–186, 41 A. 555; Coburn v. Raymond, 76 Conn. 484, 491, 57 A. 116, 100 Am. St. Rep. 1000; Sims v. Everhardt, 102 U. S. 300, 309, 26 L. Ed. 87. The plaintiff, therefore stands in the position of asking a mortgage to be foreclosed which, as far as appears, has no established status. Such a mortgage may not be made the subject of foreclosure until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagor.

We are thus brought to the underlying question of the case, which is whether or not a court of equity may, by compelling the present exercise by or for the defendant of his right of affirmance or disaffirmance, or by exercising for him the choice which is his, or in some other way, fix definitely and finally the status of the transactions recited in the record, and thus either establish the validity of the note and mortgage as a preliminary to a foreclosure, or in some other manner permanently settle the rights of the parties. In answering this question we must bear in mind that the incapacity of infants to enter into binding contracts or make valid conveyances is the same in equity as at law, and that the same rules of public policy govern and the same consequences attach. Pomeroy's Equity Jurisprudence, § 945. It follows that, in the absence of other facts than that of an infant's participation in a contract or conveyance, there cannot exist a situation in which, through the operation of an estoppel, validity will be given to it, or through equitable intervention it will be set aside, and thus by one means or the other an effect be given to the transaction different from that which the general policy of the law has seen fit to attach to it. Baker v. Stone, 136 Mass. 405; Corey v. Burton, 32 Mich. 32. In other words, a court, whether of equity or of law will not hold itself justified in depriving an infant, who was of the age of presumed natural capacity at the time of his participation in a property transaction, of the right or privilege which is deemed essential to his proper protection of affirming or disaffirming it upon his arrival at the age of legal capacity, unless there appears in the situation presented some fact in addition to such participation—some fact which is recognized as furnishing the basis for equitable interposition generally, or as laying the foundation for an estoppel. * * *[20] Mere concealment of infancy has by common consent been regarded insufficient to that end, or as in any way creating an enforceable obligation. Strikeman v. Dawson, 1 De Gex & Sm. 90; Baker v. Stone, 136 Mass. 405; Davidson v. Young, 38 Ill. 145; Stoolfoos v. Jenkins, 12 Serg. & R. (Pa.) 403; Brantly v. Wolf, 60 Miss. 420.

We have no occasion to consider the questions which are suggested by these cases. Reference is here made to the attitude which the courts

[20] Cases were here cited upon the question of whether an infant may, by misrepresentation of age, be estopped to disaffirm a conveyance.

have assumed only for the purpose of showing their reluctance to withdraw from infants the privileges as respects their property engagements which are bestowed upon them for their protection, and that such withdrawal is never countenanced, except under strong justification from circumstances other than their participation in the transaction. The facts spread upon this record will be examined in vain for such a circumstance. It contains nothing pertinent to the plaintiff's right to invoke judicial aid, save that the plaintiff sold and conveyed to the defendant minor the equity of redemption in the land in question, in consideration of the latter's assumption of an existing mortgage thereon; the payment down of a sum in cash, and the execution and delivery by the defendant to the plaintiff of the note and mortgage in suit, and that this note has never been paid. There is no averment of any fraud or fraudulent representation; not even one of concealment. In fact, it does not appear that the plaintiff was not fully aware of the defendant's infancy and voluntarily chose to assume the risk of dealing with him. The substance of the plaintiff's allegations and prayers, therefore, is that he dealt with a minor and now asks the law to relieve him from the inconvenience, hazard, and possible loss attending such transactions. He wishes to escape the consequences which the law has seen fit to attach to the situation in which he finds himself, and no reason for that escape is presented, save such as the general policy of the law has adjudged inadequate. Clearly he has failed to show a case for equitable intervention.

There is no error. The other Judges concurred.

SECTION 2.—LIMITATIONS UPON THE RIGHT TO DISAFFIRM CONVEYANCES AND EXECUTED CONTRACTS —ACCOUNTABILITY FOR CONSIDERATION

BARTHOLOMEW v. FINNEMORE.

Supreme Court of New York, 1854. 17 Barb. 428.

This was an action brought before a justice of the peace, to recover the value of a wagon, a promissory note for $30, and a bank note for $5, which the plaintiff alleged were his property, and that the defendant had converted them to his own use. On the trial in December, 1852, it appeared that the plaintiff was 20 years of age. That in March of that year, his father "gave him his time," and he went into the blacksmith's business. In October, 1852, he bought a horse of the defendant and paid him, therefore, a wagon, a note for $30, payable to the father of the plaintiff, and signed by C. and C., and $5. The father of the plaintiff was present at the trade and indorsed the note of

C. and C.; the defendant insisting that he should do so, and let his son have some money. After the plaintiff had kept the horse about one month, he tendered him back to the defendant and demanded the wagon, note and money he had given in exchange for him; but the defendant refused to receive the horse or return the other property. There was proof on the part of the plaintiff tending to show that the horse was "balky" when the plaintiff took him; and on the part of the defendant, to show that the plaintiff had misused him, and that he had, in consequence, greatly depreciated in value after the plaintiff took him, and before he was tendered back. The cause was tried by a jury, who found a verdict for the defendant. The judgment was reversed by the county court of the county of St. Lawrence, and the defendant appealed.

By the Court—Hand, P. J. It is quite evident that the trade between the parties was made with the knowledge of the father of the plaintiff, and with his consent. He knew of it, was present, and indorsed the note which was part of the consideration given for the horse; and furnished some money, which was probably paid by the plaintiff on that occasion. If so, as he was the natural guardian of the plaintiff, I am inclined to think it disposes of an objection suggested by Jones, Chancellor, in Stafford v. Roof, 9 Cow. 626, that an infant can make no contract during his wardship. Indeed, I do not find that the objection has prevailed.

Generally, a contract can be rescinded in toto by one of the parties, only where the other can be placed in the same situation he occupied when the contract was made. Chit. on Cont. 636; Hunt v. Silk, 5 East, 449; Hogan v. Weyer, 5 Hill, 389; Vorhees v. Earl, 2 Hill, 288, 38 Am. Dec. 588; Bradley v. Bosley, 1 Barb. Ch. 125; Blackburn v. Smith, 2 Exch. R. 783; Reed v. Blandford, 2 Y. & J. 278; Fitt v. Cassanet, 4 M. & G. 898. And if the rescission is on the ground of fraud, it must be done promptly and unreservedly. Masson v. Bovet, 1 Denio, 74, 43 Am. Dec. 651. But the jury must have found the defendant had not been guilty of fraud; and also that the horse had been misused by the plaintiff, and was of less value when tendered back, than at the time of the trade. There was evidence to that effect, and one witness testified that the depreciation was one half of his value. And it appears the plaintiff knew of the supposed defects of which he now complains, within a few days after he took the horse. The only question then is, whether the plaintiff, being an infant, could rescind or avoid the contract, and recover back the property, under these circumstances.

Nearly all of the contracts of an infant, except for necessaries, are voidable at his election. And the better opinion seems to be, that his executory contracts, and contracts of sale of his personal property, may be avoided during his minority. Stafford v. Roof, 9 Cow. 626; Bool v. Mix, 17 Wend. 132, 31 Am. Dec. 285; Corpe v. Overton, 10 Bing. 252; Railway Co. v. Coombe, 3 Exch. R. 565, 5 Bac. 606; Mil-

lard v. Hewlett, 19 Wend. 301; Co. Litt. 380, a. Though that has been doubted, where he sells chattels and delivers them with his own hand. Fonda v. Van Horne, 15 Wend. 635, 30 Am. Dec. 77; Roof v. Stafford, 7 Cow. 179.

But, admitting he can do this during his minority; in the case now under consideration, the contract was executed; and there are several decisions, that if an infant has executed a contract on his part, by the payment of money or delivery of property, he cannot afterwards disaffirm it and recover back the money, or claim a return of the property, without restoring to the other party the consideration received from him. Holmes v. Blogg, 8 Taunt. 508; s. c., 2 Moore, 532; recognized in Corpe v. Overton, 10 Bing. 252; Farr v. Sumner, 12 Vt. 28; Roof v. Stafford, 7 Cow. 182; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Chitt. on Cont. 147. And see Medbury v. Watrous, 7 Hill, 114, and cases there cited; 2 Kent, 240; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; North Western R. Co. v. McMichael, 5 Exch. R. 114, and note to American edition; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Story on Cont. § 62. In Newry, &c., R. Co. v. Coombe, 5 Exch. R. 565, the infant had received no advantage whatever. It has been a question, whether he can be sued for what he receives upon an executory agreement after he avoids it. Reeves' Dom. Rel. 243 et seq.; Woodworth, J., Roof v. Stafford, 7 Cow. 182. However that may be, after he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration; or, at least, an equivalent. This the plaintiff did not do, nor offer to do, in this case. He had the use of the horse for some time; and probably, by improper treatment, reduced him to one half of his former value; for all of which he offered no compensation.

The judgment of the county court should be reversed, and that of the justice affirmed.

Ordered accordingly.[21]

MANNING v. JOHNSON.

Supreme Court of Alabama, 1855. 26 Ala. 446, 62 Am. Dec. 732.

Trespass quare clausum fregit by Pierce Manning against Robert Johnson, to recover two town lots in Livingston, together with damages for their detention.

"On the trial of the cause," as the bill of exceptions states, "it was proved that the plaintiff, being the owner of the premises sued for, and an orphan, sold said premises to the defendant, and conveyed the same to him by deed, with warranty of title, in the usual form, which deed recited the consideration to be nine hundred dollars, received by

21 See note 26 on p. 224, infra.

plaintiff from defendant. The evidence conduced to show, also, that the purchase money recited in the deed had been paid by the defendant while the plaintiff was under the age of twenty-one years; also that, at the time the conveyance of the said premises was made by plaintiff, he was an infant under the age of twenty-one years; also that this suit was commenced by plaintiff to recover said premises immediately after attaining the age of twenty-one years, the defendant being in possession thereof, and having received the possession from plaintiff at the time said conveyance was made to him. There was evidence also tending to show that plaintiff represented himself to be of age, and claimed to act for himself, and had voted at an election, and that defendant, at the time of purchasing, was to some extent a stranger. There was no evidence that plaintiff had returned, or offered to return, the purchase money received by him from the defendant.

"Upon these facts, the question was, whether plaintiff could recover without having shown a return, or an offer to return, the purchase money which he had received from the defendant for the premises sued for. The court charged the jury that, if they believed from the evidence that plaintiff, at the time he sold and conveyed the premises to the defendant, was an infant under the age of twenty-one years, but that the contract between them was executed—that is, that the purchase money was paid by the defendant, and the possession, with the deed, delivered up by plaintiff—then, to entitle plaintiff to recover in this action, he must have repaid, or offered to repay, the purchase money to the defendant; and to this charge the plaintiff excepted."

This charge of the court is now assigned for error.

CHILTON, C. J. It is now the settled doctrine that the deed of an infant is not void, but voidable only. Reeves' Dom. Rel. p. 250 et seq.; Zouch v. Parsons, 3 Burr. 1794; Elliott v. Horn, 10 Ala. 348–354 (44 Am. Dec. 488); Weaver v. Jones, 24 Ala. 420.

Ordinarily, it is the privilege of an infant to rescind his contract at pleasure, and this without regard to whether such contract was a fair one or not. This general rule is subject to certain exceptions; but these are not involved in the case before us, unless his failure to return the purchase money, which he has received in consideration of the sale and conveyance of his land, deprives him of the power of rescission.

Upon this subject we have carefully looked into the books, and find much conflict of authority; and without, in this place, commenting upon them, we state as our conclusion that, while we fully subscribe to the doctrine that the infant must use his privilege as a shield to defend himself, and not as an offensive weapon to injure others, we cannot subscribe to the doctrine that he must refund the purchase money which he has received, and which there is no evidence he has had in his possession after he attained his majority, as a condition precedent to his rescinding or avoiding his conveyance at law. We agree that the strong current of authority is otherwise in a court of equity; but we express

no opinion now as to the rule that court should proceed upon in such cases.

The effect of the ruling of the primary court is to turn this conveyance into a quasi mortgage, and to allow the infant the mere right of redeeming his land upon repayment of the sum advanced to him. But we apprehend, if the parties had expressly contracted for that relation, the infant would not have been held concluded by the mortgage. Mr. Coote, in his work on Mortgages, p. 105, says: "With respect to infants, they are of course incapable of executing a mortgage of their own property, or of lending money on mortgage; nor has the guardian, or trustee, nor even the court of chancery, any power to change the nature of the infant's estate," etc. 1 Pow. on Mortg. 58, 59.

When we come to reason upon the proposition, however, it is surrounded with difficulty; for, if the infant can raise money to the whole value of his estate by a voidable sale or mortgage, and can only avoid the conveyance after refunding, he is furnished the means of indulging habits of dissipation and prodigality, which in many instances would doubtless result in squandering the whole of the proceeds, while the purchaser, or mortgagee, would risk nothing—the land or estate of the infant so sold or mortgaged furnishing adequate security. On the other hand, to allow the infant to retain the consideration, and yet to repudiate or disaffirm the conveyance, would tempt as well as enable him to practice frauds upon others. We think the safe rule should furnish a check both upon the infant and the party contracting with him. That rule we take to be this: If the infant, after he arrives at age, is shown to be possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmance of the contract. So, likewise, if it be shown that he has the power to restore the thing that he received, he cannot be allowed to rescind, without first making restitution. But if, as in the case before us, the consideration paid was money, and there is no proof that he was possessed of the money so obtained, either actually or constructively, after he attained his majority, so as to be able to restore it to the purchaser, the infant shall not be required, in a court of law, to repay the amount he received, as a perequisite to an avoidance of his deed by suit for the land. When he succeeds in recovering the land, it works the destruction of the contract; and, according to the more modern authorities, which we are disposed to consider as correct, the purchaser who has lost the land may sue for and recover the money; and especially would this action lie in a case like this, where the purchaser was induced to enter into the contract upon the false representations made by the infant, that he was of full age, and consequently competent to contract. We would not be understood as intimating, that, if the infant sought a rescission in a court of equity, he would not be required to refund the purchase money, whether he had disposed of it or not before he arrived

at lawful age. See, upon this subject, Dart on Vendors and Purchasers of Real Estate, p. 3; Chambers on Infancy, p. 412; 1 Fonb. Eq. b. 1, c. 3, § 4, and authorities on the briefs of counsel.

Let the judgment be reversed, and the cause remanded.[22]

McGUCKIAN v. CARPENTER.

CARPENTER v. McGUCKIAN.

Supreme Court of Rhode Island, 1920. 43 R. I. 94, 110 A. 402, 16 A. L. R. 1473.

Actions by Hugh McGuckian against Arthur H. Carpenter, and by the latter against the former. Verdict in favor of the latter in both actions, new trial denied and former excepts. Exceptions overruled.

SWEETLAND, C. J. The first of the above-entitled cases is an action in assumpsit to recover the amount due upon certain promissory notes given by the defendant, a minor, to the plaintiff in part payment upon the sale by the plaintiff to the defendant of a horse, wagon, and harness. The second of the above-entitled cases is an action in assumpsit to recover the sum paid in cash by the infant plaintiff in part payment for said horse, wagon, and harness.

The cases were tried together before a justice of the superior court, sitting with a jury, and resulted in each case in a verdict for said minor, Arthur H. Carpenter. Hugh McGuckian filed his motion for a new trial in each case, and each motion was denied by said justice. Each case is before us upon the exception of McGuckian to the decision of the justice denying the motion for new trial, and also upon certain exceptions taken by said McGuckian to rulings of said justice made in the course of the trial.

At the trial McGuckian did not question the infancy of Carpenter at the time of the sale of said horse, wagon, and harness, but claimed that in the circumstances of the case said chattels were necessaries for said infant.

It appeared in evidence that Carpenter at the time of the purchase by him of the horse, wagon, and harness was 18 years of age, married, with one child; that he maintained a home and was dependent upon his weekly wages for the support of himself and family; that he used said chattels for the sole purpose of pleasure driving. The question of whether said chattels were necessaries in the plaintiff's condition and station in life was submitted by said justice to the jury with instructions that, if they found that said chattels were not necessaries they should find their verdict in favor of said infant in the action against him upon the promissory notes given by him in part payment for said chattels. The jury's verdict for the defendant in that case indicates that

[22] Accord: Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, and cases therein cited. See, also, note 26, p. 224, infra.

they found that said horse, wagon, and harness were not necessaries in the circumstances of the defendant's life. The verdict has been approved by said justice, and we find no ground for disturbing his decision in that regard. The purchase was manifestly an unwise and indiscreet transaction on the part of the defendant quite in accord with the thoughtlessness and improvidence ascribed to youth.

At the time of the avoidance of the contract of sale by the minor and the commencement of the action to recover the amount of cash given by him in part payment, he did not return said chattels nor any part of them to McGuckian, nor has he done so subsequently. Prior to said disaffirmance Carpenter had sold the wagon and harness, and the horse had become so emaciated and disabled either by disease or neglect that in the judgment of the agent of the Society for Prevention of Cruelty to Animals it ought to be shot. From the evidence it is not entirely clear what has become of the horse, but it is manifest that it had become worthless and had passed out of the possession of Carpenter before the commencement of these actions. In the suit against McGuckian to recover the cash paid on the purchase price the defendant takes the position that, as Carpenter has not returned the property, he ought not to be permitted to disaffirm the sale and obtain a return of the money paid. This claim was the basis of a motion, made at the close of the evidence in the case against McGuckian, and said justice should direct a verdict for the defendant. That motion was denied by said justice, and the defendant excepted. He also excepted to that portion of the charge of said justice in which he instructed the jury "that, if Carpenter had disposed of the chattels which came to him or if they were not in his possession or control, it would not be necessary for him to restore them to McGuckian before he could maintain the action." In support of these exceptions before us counsel for McGuckian has called to our attention the opinion of courts in some jurisdictions that in all cases an infant, on his avoidance of an executed contract, must return the property or consideration received before he can maintain his action for the money or property which he gave in the transaction, and, if he has disposed of the money or goods or has so misused them that he cannot restore them, then he cannot be permitted to disaffirm his contract. These cases are based on the consideration that minors should not be permitted to use the shield of infancy as a cover for dishonesty and the doing of injury to others dealing with them in good faith. We do not find that this court has passed upon the exact question involved in this exception. We are of the opinion that, when an executed contract is not one for his necessaries, an infant should be permitted to disaffirm it and recover the consideration moving from him, and should be required on his part to return the consideration that remains in his hands; but, if he has dissipated the consideration or lost it, or for any reason he is unable to restore it to the other party, he none the less should be permitted to disaffirm the contract and recover back the consideration moving from him. The law gives to a

minor the right to disaffirm his contracts on the ground of the disability of infancy. This has been provided as a protection to him from the consequences of his own improvidence and folly. It is the same lack of foresight that in most instances leads to his dissipation of the proceeds of his voidable contracts. To say that he shall not have the protection by disaffirmance with which the policy of the law seeks to guard him, unless he has had sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion.

A determination made in accordance with either view as to an infant's right of disaffirmance, when he is unable to return the consideration of the contract, will in many cases result in considerable hardship to one party or the other. Not infrequently, even in cases where the infant still has the consideration and returns it to the other party to the contract, such other party is far from being placed in statu quo. It has been said that the right of an infant to avoid his contract is absolute and paramount to all equities.

The view which we have taken appears to us to have the support of the weight of authority. In the early case of Bartlett v. Cowles, 15 Gray (Mass.) 445, the court appears to have taken the contrary view and to have held that an infant might avoid his contract only by restoring the consideration. In the later case of Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101, the doctrine of Bartlett v. Cowles, supra, was expressly repudiated, and in Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117, it was held that an infant's deed may be avoided "without the previous return, or offer to return, the consideration paid therefor." The rule in Chandler v. Simmons has been followed in the later Massachusetts cases. Pyne v. Wood, 145 Mass. 558, 14 N. E. 775; McCarthy v. Henderson, 138 Mass. 310; Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; White v. New Bedford, etc., 178 Mass. 20, 59 N. E. 642. See, also, MacGreal v. Taylor, 167 U. S. 668, 17 S. Ct. 961, 42 L. Ed. 326; Leacox v. Griffith, 76 Iowa, 89, 40 N. W. 109; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

We find no error in the refusal to direct a verdict in accordance with the motion of McGuckian, nor in that portion of the charge to which exception was taken.

All of the exceptions of McGuckian in each case are overruled. Each case is remitted to the superior court for the entry of judgment on the verdict.[23]

[23] See note to this case, 16 A. L. R. 1475, also 36 A. L. R. 782. See, also, note 26, p. 224, infra.

PETTIT v. LISTON et al.

Supreme Court of Oregon, 1920. 97 Or. 464, 191 P. 660, 11 A. L. R. 487.

Action by Arthur Waldo Pettit, a minor, by Martha Pettit, guardian ad litem, against L. C. Liston and F. M. Robinson, copartners doing business as the Cycle Supply Company. From a judgment for defendants after the overruling of a demurrer to the answer, plaintiff appeals. Affirmed.

Plaintiff, a minor, brings this action by his guardian to recover $125 paid by him upon the purchase price of a certain motorcycle purchased from the defendants.

The case involves the question of whether or not a minor who has purchased an article of this kind, and taken and used the same, after paying part or all of the purchase price, can return the article and recover the money paid without making good to the vendors the wear and tear and depreciation of the same while in his hands.

The defendants in the case were engaged in the selling of motorcycles and attachments. The plaintiff purchased from them a motorcycle at the agreed price of $325. He paid $125 down, and was to pay $25 per month upon the purchase price until the payments were completed. He took and used the motorcycle for a little over a month and finally returned the same to the defendants and demanded the return of his money. The defendants answer and allege that plaintiff used the machine, and in so doing damaged it to the amount of $156.65.

There was a demurrer to the answer, which was overruled by the court, and the plaintiff refusing to reply or plead further and standing upon his demurrer, a judgment and order were entered dismissing the cause, from which the plaintiff appeals.

BENNETT, J. (after stating the facts as above). The amount involved in this proceeding is not large, but the question of law presented is a very important one, and one which has been much disputed in the courts, and about which there is a great and irreconcilable conflict in the authorities, and we have therefore given the matter careful attention.

The courts, in an attempt to protect the minor upon the one hand, and to prevent wrong or injustice to persons who have dealt fairly and reasonably with such minor upon the other, have indulged in many fine distinctions and recognized various slight shades of difference.

In dealing with the right of the minor to rescind his contract and the conditions under which he may do so, the decisions of the courts in the different states have not only conflicted upon the main questions involved, but many of the decisions of the same court in the same state seem to be inconsistent with each other; and oftentimes one court has made its decision turn upon a distinction or difference not recognized by the courts of other states as a distinguishing feature.

The result has been that there are not only two general lines of de-

cisions directly upon the question involved, but there are many others, which diverge more or less from the main line, and make particular cases turn upon real or fancied differences and distinctions, depending upon whether the contract was executory or partly or wholly executed, whether it was for necessaries, whether it was beneficial to the minor, whether it was fair and reasonable, whether the minor still had the property purchased in his possession, whether he had received any beneficial use of the same, etc.

Many courts have held broadly that a minor may so purchase property and keep it for an indefinite time, if he chooses, until it is worn out and destroyed, and then recover the payments made on the purchase price, without allowing the seller anything whatever for the use and depreciation of the property.

Many other authorities hold that where the transaction is fair and reasonable, and the minor was not overcharged or taken advantage of in any way, and he takes and keeps the property and uses or destroys it, he cannot recover the payments made on the purchase price, without allowing the seller for the wear and tear and depreciation of the article while in his hands.

The plaintiff contends for the former rule, and supports his contention with citations from the courts of last resort of Maine, Connecticut, Indiana, Massachusetts, Vermont, Nebraska, Virginia, Iowa, Mississippi, and West Virginia, most of which(although not all) support his contention. On the contrary, the courts of New York, Maryland, Montana, Illinois, Kentucky, New Hampshire, and Minnesota, with some others, support the latter rule, which seems to be also the English rule.

Some of the cyclopedias and some of the different series of selected cases state the rule contended for by plaintiff, as supported by the strong weight of authority; but we find the decisions rather equally balanced, both in number and respectability.

In Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703, in an opinion by Mr. Justice Haight, concurred in by the entire court, it is said:

"There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but in so far as the payments made were concerned the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (volume 2, p. 240), says: 'If an infant pays money on his contract and enjoys the benefit of it and then avoids it when he comes of age he cannot recover back the

consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other.'"

This ruling is followed in Wanisch v. Wuertz, 79 Misc. Rep. 610, 140 N. Y. S. 573, and Lown v. Spoon, 158 App. Div. 900, 143 N. Y. S. 275.

In Adams v. Beall, 67 Md. 53, 8 A. 664, 1 Am. St. Rep. 379, the plaintiff, a minor, had paid a large sum of money into a partnership concern. The business was not successful and the infant undertook to rescind his contract and recover the money paid. It was held that he could not recover, and the court, citing from an opinion by Lord Justice Turner in the English case of Corpe v. Overton, 10 Bing. 252, said:

"He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back."

And the same court, as late as 1910, in the case of Latrobe v. Dietrich, 114 Md. 8, 24, 78 A. 983, 989, said:

"If the infant have already advanced money upon a contract, which is executory upon the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed, and especially if he had received the benefit of his contract. * * *

"Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he cannot avoid it and recover back his money."

In Clark v. Tate, 7 Mont. 171, 14 P. 761, it is said:

"We think that the sound rule is, as laid down by Chancellor Kent, as follows: 'If an infant pay money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword.'"

To the same effect are Chicago Mut. Life Indemnity Ass'n v. Hunt, 127 Ill. 257, 277, 20 N. E. 55, 2 L. R. A. 549; Bailey v. Barnberger, 50 Ky. (11 B. Mon.) 113; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Berglund v. American Co., 135 Minn. 67, 160 N. W. 191.

Our attention has not been called to any Oregon case bearing upon the question, and as far as our investigation has disclosed, there is none.

In this condition of the authorities, we feel that we are in a position to

pass upon the question as one of first impression, and announce the rule which seems to us to be the better one, upon considerations of principle and public policy.

We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands.

Of course, if there has been any fraud or imposition on the part of the seller, or if the contract is unfair, or any unfair advantage has been taken of the minor in inducing him to make the purchase, then a different rule would apply. And whether there had been such an overreaching on the part of the seller would always, in case of a jury trial, be a question for the jury.

We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our Far Western states.

Here, minors are permitted to and do in fact transact a great deal of business for themselves, long before they have reached the age of legal majority. Most young men have their own time long before reaching that age. They work and earn money and collect it and spend it oftentimes without any oversight or restriction.

No business man questions their right to buy, if they have the money to pay for their purchases. They not only buy for themselves, but they often are intrusted with the making of purchases for their parents and guardians. It would be intolerably burdensome for every one concerned if merchants and other business men could not deal with them safely, in a fair and reasonable way, in cash transactions of this kind.

Again, it will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them in this way, and using them until they are worn out and destroyed, go back and compel the business man to return to them what they have paid upon the purchase price. Such a doctrine, as it seems to us, can only lead to the corruption of young men's principles and encourage them in habits of trickery and dishonesty.

In view of all these considerations, we think that the rule we have indicated, and which is substantially the rule adopted in New York, is the better rule, and we adopt the same in this state.

We must not be understood as deciding at this time what would be the rule where the vendor is seeking to enforce an executory contract

against the minor, which is a different question not necessarily involved in this case.

It follows that the judgment of the court below should be affirmed.[24]

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

LANE v. DAYTON COAL & IRON CO.

Supreme Court of Tennessee, 1899. 101 Tenn. 581, 48 S. W. 1094.

Action by Eva Lane, by her next friend, against the Dayton Coal & Iron Company, Limited. Judgment for defendant, and plaintiff appeals.

SNODGRASS, C. J. This is a suit at law by an infant for damages alleged to have been sustained by the negligent killing of her husband. Defendant's eighth plea was accord and satisfaction—that it had paid plaintiff $150 in cash and other consideration, aggregating $200, in full satisfaction of her claim, before the institution of this suit. The plaintiff demurred to this plea on the ground that the declaration showed that plaintiff was, and still is, an infant, and hence was not bound by such an executed contract, and was not bound to refund, or tender with the plea, the consideration received; but she averred a willingness to let the amount received go as a credit on the judgment now sought, if one is obtained. The Circuit Judge overruled the demurrer, and, plaintiff declining to plead further by way of replication, or pay or tender the consideration received, final judgment was rendered for defendant, and plaintiff appealed in error.

Here it is assumed, in argument, that plaintiff may, as a minor, and before attaining majority, repudiate an executed contract of this character, and then insisted that she may do so without refunding or tendering the consideration received, and that this is especially true where the controversy is not in equity, but at law, as in this case; and, further, that if an infant sues for rescission or in any form of pleading attempts to rescind an executed contract of her own, made during minority, she is not bound to restore the consideration received if it has been squandered or is not on hand at the time of the repudiation of the contract, and in support of these positions several authorities are cited.

How this last proposition is, and whether it could have recognition as law in this State, we need not decide. There was no replication to the plea, averring that any part of the consideration had been squandered or was not on hand when the suit was brought or plea filed, and no defense except by demurrer, relying on the declaration—averred infancy of plaintiff. The plaintiff expressly declined to plead further, though ordered to do so by the Court.

[24] See note to this case, 11 A. L. R. 491, also 50 A. L. R. 1187. See, also, note 26, p. 224, infra.

As to the other proposition, that the plaintiff might repudiate an executed contract, either in a court of law or equity, without refunding or tendering the consideration received, plaintiff is in error. In a case like the present, where the contract, if between persons of full age, would have been valid, and, as to an infant contractor, would, at most, have been merely voidable—nothing else appearing—there could be no repudiation without repayment or tender of consideration received. On this question, as precisely stated, there is no distinction in the rule applied, whether in a court of law or equity, and whether its application is made to an effort to rescind during infancy or after majority. We have a case holding that, where an infant, by bill in equity, sought relief against a void contract of its ancestor in reference to real estate, no tender of the amount received by the ancestor was essential, but the property, being, of course, always in actual existence, may be charged, on final decree, with the consideration, and repayment or tender in advance excused. Wiley v. Heidell, 12 Heisk. 99. But that case, and those like it, are not authority here, because that was not one where the infant received the consideration, but where the ancestor received it, and on a void sale of real estate.

In the case before us it is obvious, even if it were one of equity cognizance and brought in equity, that such relief could not be assumed as proper or appropriate, because there may never be anything due plaintiff on the original claim and no property or recovery, therefore, on which a lien could be declared. Whether, in this State, a minor, through a next friend, can repudiate at all a merely voidable executed contract as to personalty, or must wait until after his or her majority, we need not determine. It has been decided that a minor cannot thus repudiate such a contract as to realty. McGan v. Marshall, 7 Humph. 121; Scott v. Buchanan, 11 Humph. 468; Swafford v. Ferguson, 3 Lea, 294, 31 Am. Rep. 639; Hook v. Donaldson, 9 Lea, 56; 10 Am. & Eng. Enc. Law (1st Ed.) p. 643, and note.

In some jurisdictions it is held that a different rule prevails as to personalty. Many authorities are collected on this point in 10 Am. & Eng. Enc. Law (1st Ed.) pp. 637, 643, and notes. In second note of last page, a Tennessee case is cited, on affirmative proposition that the infant can before majority repudiate an executed contract as to personalty. Grace v. Hale, 2 Humph. 27, 36 Am. Dec. 296. But the case is not authority for the proposition. It was, in fact, allowed there, but no question as to the right to repudiate was made. It seems to have been conceded by the parties, and other questions presented for decision. But whether or not there be a distinction in this State as to merely voidable contracts in respect to personalty and realty, as to time of repudiation and as to return of consideration, there is no sound rule enforced anywhere in which this plaintiff in the state of the pleadings in this case is entitled to recover or to reverse the action of the Circuit Judge by a showing of affirmative error.

Without regard to manner or time of her effort to repudiate, there

is lacking such essential act and pleading as would give title to relief, under such general rule, as might be applied amid the diversity of judicial opinion on the several questions, or phases of the question, presented. Such a general rule is well stated in the editor's first note to the case of Englebert v. Troxell (Neb.) 26 L. R. A. 177 (s. c. 58 N. W. 852), as follows: "The rule which comes the nearest to being general is, that all consideration which remains in the infant's possession upon his reaching majority, or at the time of an attempted disaffirmance in case he is still under age, must be returned, but that disaffirmance will not be defeated by inability to return what he has parted with prior to such time. He will not be permitted to regain what he parted with, or refuse payment while still possessed of what he received. There have been many distinctions attempted between executory and executed contracts, and between seeking relief at law and in equity, but, with only a few exceptions, the rule as stated above has governed the decision, regardless of the facts relied on as distinguishing facts. There is no substantial ground for a distinction as to the rule to be applied, although there may be as to the manner of its application."

On the merits, as to refunding or tendering, with some distinctions as to time and special facts, the Tennessee cases, so far as they go, rightly understood, are in accord. Smith v. Evans, 5 Humph. 70; Parker v. Elder, 11 Humph. 546; Nichol v. Steger, 6 Lea, 396. The rule is the same in case of married women and lunatics. Pilcher v. Smith, 2 Head, 208; Hilton v. Duncan, 1 Cold. 321; Wright v. Dufield, 2 Baxt. 222; Aiken v. Suttle, 4 Lea, 120; Bradshaw v. Van Valkenburg, 97 Tenn. 323, 37 S. W. 88.

We conclude there is no error in the judgment of the Circuit Court, and it is affirmed with costs.[25]

WORTHY v. JONESVILLE OIL MILL.

Supreme Court of South Carolina, 1907. 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688.

Action by Silas Worthy, by his guardian, against the Jonesville Oil Mill. Judgment for plaintiff. Defendant appeals. Reversed.

WOODS, J. While plaintiff was engaged as a laborer feeding cotton seed cakes to the mill which ground them into meal, his arm was caught in the machinery and so mangled that it became necessary to amputate it. He recovered judgment against defendant cotton oil mill company for $500 damages, under the allegation that the injury was caused by the negligence of the defendant. [The statement of the particulars of the defendant's alleged negligence is omitted.]

25 See note 26, p. 224, infra.

The defendant appeals, and alleges error, first, in the refusal of the circuit judge to grant a nonsuit on the grounds: (1) The plaintiff had executed a release and had not repaid or tendered $10, the consideration received therefor; and (2) there was no evidence of negligence.

1. As to the first point, it is to be observed the plaintiff was an infant, not only at the time he signed the release, but also when the action was brought. The general rule laid down in Levister v. Railroad, 56 S. C. 508, 35 S. E. 207, and in Riggs v. Association, 61 S. C. 455, 39 S. E. 614, that, where a release of liability for a tort has been given, no action can be maintained for damages until the consideration received for the release has been repaid or tendered. But this rule does not apply to an infant who brings suit before he attains his majority. An infant's contract relating to the settlement of torts are no more binding than those relating to other business affairs. Deal v. Hanks, 3 McCord, 257; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 89. The law, however, will not allow an infant to perpetrate a fraud; and, where he executes a release for value, the jury should inquire to what extent he has been really benefited by the consideration paid and take that into account in finding a verdict in his favor for damages. On this principle, in Scott v. Scott, 29 S. C. 420, 7 S. E. 811, an infant who repudiated and had annulled a purchase on her behalf of a house and lot was required to account for rents for the time she was in possession of the property. The real benefit, however, with which the infant must be charged is not measured by the amount of money paid to him, for the whole of it may have been squandered. The just rule is that the infant should be required to account for so much of the consideration received by him as has been used for purposes the court would sanction as being necessary for him, and so much as may still be in his hands in such form that the court could control it for his benefit if his majority has not been attained, or, if it has, for so much as the infant elected to retain on reaching his majority. The plaintiff being an infant when the suit was brought, it was not necessary for him to tender back the consideration of the release before bringing the suit, nor was it necessary for him to show his assent and signature to the release had been obtained by fraud or misrepresentation. Whether the defendant was entitled to have the consideration received from him for the release credited in making up the verdict as to the damages plaintiff had sustained was a question of fact to be submitted to the jury under the principles above stated, but the defendant could certainly take nothing more than such credit under his release. These views dispose of the motion for nonsuit based on the release and also to the several exceptions to the charge on the same subject. * * *[26] [The judgment was reversed for error in the admission of certain evidence of defendant's negligence.]

[26] Among the problems raised by this case and the five preceding cases are, of course, these: (1) Can an infant or a former infant, in a law court, recover money or property or enforce a claim, which he has during infancy paid or conveyed or released without restoring to the other party to the transaction,

the consideration given by him for the conveyance or release, if the infant or former infant still has the consideration, either in its original or some other form? (2) Is there a duty to compensate the other party even for such parts of the consideration received by the infant as the infant no longer has in any form, as if, for example, he has wholly or partly used up the consideration or has transferred it and consumed its proceeds? (3) If problem 1 be answered in the negative, or problem 2 in the affirmative, is the restoration a condition precedent to the commencement of an action by the infant, or will it merely reduce pro tanto the amount of the judgment, if the infant's suit be for money and the consideration in the infant's hands be in the form of money, or there is no part of the consideration in the infant's hands, but he is held to be under a duty to compensate the other party for the consideration which he has lost or used up? (4) Where the infant still has in some form other than money the consideration received or its proceeds, is restoration or tender a condition precedent to the commencement of the action by the infant, or will the commencement of the action or the recovery of a judgment therein automatically restore to or vest in the other party a title to such consideration still in the infant's hands? And if the infant is suing for the specific return of property other than money, and has, or is accountable for any of the consideration which he received, must he tender it before bringing suit, or may he recover the property, thereby giving the other party a right of action against him for the money or property for which he is accountable?

Problem 1 has been quite universally answered in the negative, as is indicated by the statements of the courts in all of the six cases, and in others hereinafter. Cf. however, Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315, 20 N. W. 717 (1884), where, under a statute of Iowa, it was held that nothing except the identical original consideration need be considered.

Upon problem 2 there has been, as appears from the cases, a conflict of authority. The cases are collected in notes in the following places: 11 A. L. R. 491, supplemented in 50 A. L. R. 1187; 16 A. L. R. 1475, supplemented in 36 A. L. R. 782; and 13 A. L. R. 402, the last relating to the avoidance of an infant's release of damages for tort.

In problem 3 the courts have generally merely required that the consideration for which the infant is accountable be allowed to reduce his claim or to completely offset it. Some cases, such as Lane v. Dayton Coal & Iron Co., 101 Tenn. 581, 48 S. W. 1094 (1899), supra, p. 221, have required its return as a condition precedent to suit. The distinction suggested in Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. 690, 12 Ann. Cas. 688 (1907), supra, p. 223, between cases where the infant sues before majority and those where he sues after majority, does not appear to have been followed. The subject of problem 3 is illustrated in many of the cases covered by the notes in A. L. R., hereinbefore cited in this note.

As to problem 4, there are numerous statements by the courts, and some decisions, to the effect that restoration or tender is a condition precedent to suit. See Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428 (1854), supra, p. 209; Manning v. Johnson, 26 Ala. 446, supra, p. 211, Bombardier v. Goodrich, 94 Vt. 208, 110 A. 11, 9 A. L. R. 1028 (1920). In Indiana it is held that such tender need not be made as a condition precedent to suit. See Carpenter v. Carpenter, 45 Ind. 142 (1873), infra, p. 226, semble. See, also, Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117 (1867), semble, accord.

The problem of tracing the consideration received by the infant into various forms of proceeds is considered herein, infra, pp. 245 and 250.

CARPENTER v. CARPENTER.

Supreme Court of Judicature of Indiana, 1873. 45 Ind. 142.

WORDEN, J. This was an action by the appellant against Peter G. Boor. There was judgment below for the defendant. Since the appeal, the death of Boor has been suggested, and Jacob A. Carpenter, his administrator, has been made a party hereto as appellee.

The complaint consisted of two paragraphs, the first being general, for the value of a horse sold and delivered; and the second alleged that the plaintiff was an infant under the age of twenty-one years; that in August, 1868, he was the owner of a gelt horse of the value of one hundred and fifty dollars, which he then, at the solicitation of the defendant, traded to the latter for a stallion, and that he delivered the gelding to the defendant, who delivered to him the stallion; that on December ——, 1868, the defendant sold the gelding and parted with his possession; that on the 11th of December, 1868, the plaintiff tendered the stallion back to the defendant and offered to give him up, at the mill and residence of the defendant, and demanded from the defendant the redelivery of the gelding to him, the plaintiff; and the plaintiff then and there informed the defendant that he was under the age of twenty-one years, and that he sought to rescind and avoid the contract aforesaid; and the plaintiff then and there offered to place the stallion in the defendant's stable, but the defendant wholly refused to receive him in any way whatever, and forbade the plaintiff to leave him at the stable; that the plaintiff could not turn the stallion out upon the commons at or near the residence and stable of the defendant, because of the dangerous character of the animal; wherefore the plaintiff took him home and kept him, etc.; that the plaintiff has been at all times, and still is, ready and willing to deliver the stallion to the defendant, and desires to avoid the contract because of his nonage; and he demands judgment for two hundred dollars.

To this paragraph the defendant answered, among other things, as follows:

"And for sixth and further answer," etc., "says that it is true that plaintiff and defendant did exchange horses as is charged in said second paragraph in said complaint, but he says that the said exchange was made at the instance and request of plaintiff, and that for the purpose of inducing the defendant to make said exchange, said plaintiff falsely, corruptly, and fraudulently represented to defendant" (that he) "was at the time of said exchange over the age of twenty-one years; that defendant was ignorant of the age of said plaintiff, and relied upon the said false and fraudulent statements as true, and fully believed them to be true, and by the said statements was induced to make said exchange; that at the time of said exchange, the said horse by defendant exchanged to plaintiff was of the value of two hundred

dollars, and greatly exceeded in value the horse by plaintiff exchanged to defendant; that before the defendant had any knowledge that" (the plaintiff) "was an infant under the age of twenty-one years, and before any demand by plaintiff for a rescission of said contract, said defendant sold the horse so exchanged to him by the plaintiff, and the same was, at the time of the said demand by plaintiff, entirely out of the control of the defendant, of which fact the plaintiff had full knowledge, and knew that it was out of the power of the defendant to rescind said contract; and said defendant further says that the plaintiff, after the said exchange of horses as aforesaid, and before said demand to rescind said contract, as in said second paragraph of complaint set forth, purposely and intentionally, and with the intent to greatly injure and totally to destroy and diminish the value of the said horse so by him procured of the said defendant, did starve, overwork, beat, cut, bruise, and wound, cripple, founder, and strain the said horse, so that by reason of the said injuries so committed, caused, and inflicted upon said horse by plaintiff, said horse was and is rendered wholly valueless; and defendant prays judgment."

A demurrer for want of a statement of sufficient facts was filed to this paragraph of the answer by the plaintiff, but it was overruled, and an exception was taken.

On issue joined, there was a trial by jury, resulting in a verdict and judgment for the defendant, a motion for a new trial on behalf of the plaintiff having been made and overruled, and exception taken.

The court gave to the jury the following instruction, to which the plaintiff excepted:

"Where a minor and an adult exchange property, and the adult acts in good faith and deals fairly with the minor in all respects, then the minor, if still in the possession of the property received of the adult, before he can recover of the adult the property the adult received of him, or its value, must return or offer to return the property received by him in as good condition as it was at the time he received the same, the unavoidable and natural decay and depreciation of the same excepted."

The correctness of this instruction and of the ruling upon the demurrer to the paragraph of the answer set out are questioned by the assignment of error.

The paragraph of the answer set out was bad, and the demurrer should have been sustained.

The contracts of infants, except those for necessaries, are void or voidable; and those in relation to personal property may be avoided by him during his minority. The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. 1 Parsons, Con. 317; 2 Kent, Com. (12th Ed.) 241. See, also, as to representations made by infants and married women, Keen

v. Coleman, 39 Pa. 299, 80 Am. Dec. 524. With regard to the injury done by the plaintiff to the stallion, as alleged in the pleading, it can have no influence in the case, unless the plaintiff, before he could maintain his action, was bound to tender the animal to the defendant, in as good condition as he received him, unavoidable and natural decay and depreciation excepted, as charged by the court. But we have concluded, upon looking into the question, that the plaintiff was not bound to make any tender of the stallion at all before he could maintain his action. Upon the avoidance of the contract by the plaintiff, the case stood as if none had been made, and his right to the possession of his gelding or the value of him became at once complete and perfect. Upon the avoidance of the contract, the plaintiff still having the stallion, the defendant became without doubt entitled to him, whatever condition he might be in, but it does not follow that the plaintiff was bound to make a tender of him before bringing his action. If the stallion received injury while in the possession of the plaintiff, the remedy of the defendant therefor, if the law furnishes any remedy, is an action for the tort. Says Mr. Parsons: "If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it subsequently to his disaffirmance, the seller, as we have said, may be remediless; unless, possibly, he does it in such a way, or under such circumstances, as to amount to a tort; but if he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract." 1 Parsons, Con. 321.

There can be no difference in principle between this case, so far as the obligation of the plaintiff to make a tender is concerned, and the case of the sale of land by an infant. In such case, it has been held several times in this State, that after coming of age he may disaffirm the contract, and recover the land without tendering back the purchase-money. Pitcher v. Laycock, 7 Ind. 398; Miles v. Lingerman, 24 Ind. 385. See, also, Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503.

[Here the court quoted extensively from the case of Chandler v. Simmons, 97 Mass. 508–514, 93 Am. Dec. 117.]

For these reasons, we are of opinion that the demurrer to the sixth paragraph of the answer should have been sustained, and that the instruction given was erroneous.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.[27]

[27] Cf. Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87 (1880), infra, p. 232, and Myers v. Hurley Motor Co., 273 U. S. 18, 47 S. Ct. 277, 71 L. Ed. 515, 50 A. L. R. 1181 (1927), infra, p. 236.

HILLYER v. BENNETT.

In Chancery, New York, 1838. 3 Edw. Ch. 222.

[Bill to set aside an assignment. It appeared from the bill that the complainant while a minor entered into a partnership with Ebenezer G. Bennett; that by certain articles of dissolution their effects were assigned to the defendant John C. Bennett in trust to pay $500.00 to a person named and to divide the residue between the complainant and Ebenezer. The case came up before the Court on pleadings and proofs.]

THE VICE-CHANCELLOR [WILLIAM T. MCCOUN]. The object of the bill in this case is, not to settle the partnership accounts between the complainant and E. G. Bennett, nor to call J. C. Bennett to an account for the surplus of the assigned property under the assignment which the partners executed to J. C. Bennett, to secure him against the five hundred dollar note, but, to set aside the assignment and to have the goods restored to the complainant, on the ground of his nonage, as well during the co-partnership as at the time of the assignment. * * *

Then, with respect to his nonage: the complainant's counsel is mistaken in saying that the acts and deeds of an infant are void in law. They are not void, but voidable only, at his election: Roof v. Stafford, 7 Cow. 179; s. c. in error, 9 Cow. 626; Eagle Fire Company v. Lent, 1 Edw. Ch. 301; Merchants Fire Insurance Company v. Grant, 2 Edw. Ch. 544. If a party is sued at law or in equity, he may plead or set up his infancy in bar, and thus avoid his contract, for he then makes his election to do so. So, it seems, in regard to personal property which he has agreed to sell and deliver, he may, under certain circumstances, disaffirm the contract and bring trover to recover it back: Stafford v. Roof, supra. But if, after he comes of age, he seeks to disaffirm and avoid his contract in a court of equity and files his bill there for the purpose of obtaining its aid, in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back; especially, if it appears that the other dealt with him in ignorance of the fact of his nonage. This equitable and just principle is recognized by Woodworth, J., Roof v. Stafford, 7 Cow. 183, and is warranted by several cases there cited.

The complainant is not entitled to have the assignment set aside and cancelled, without submitting to pay and offering to pay the note or, at least, one half of it; and, as he has not offered to do this, the court will not interfere with the assignment and the legal rights of the defendant J. C. Bennett under it. * * *[28]

[28] Accord: Bozeman v. Browning, 31 Ark. 364 (1864), semble; Gray v. Lessington, 15 N. Y. Super. Ct. 257 (1857); Smith v. Evans, 5 Humph. (Tenn.) 70

EUREKA CO. v. EDWARDS.

Supreme Court of Alabama, 1881. 71 Ala. 248, 46 Am. Rep. 314.

[Bill in equity by Eureka Company to set aside a deed of June 12th, 1869, executed by Joseph C. Burgin and Ann Judson, both minors, to Giles Edwards. The facts alleged and proved were that the consideration paid for the conveyance was $1100, of which Joseph C. and Ann Judson received $200, and each had used and expended this money before they reached twenty-one. Upon attaining their majority the said Joseph C. and Ann disaffirmed their deed to Edwards and conveyed to others, from whom the title came to the complainant, the Eureka Company.

On the hearing had on pleadings and proof the Chancellor entered a decree denying relief to the complainant and granting an injunction prayed by Giles Edwards in his cross bill, that the complainant be perpetually enjoined from setting up any claim to the premises in question. This decree is assigned as error.]

STONE, J. [The Court, after summing up the facts, proceeded thus:] It is thus shown that the appellant—complainant below—stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

(1844), case of sale of land by infant; Cummings v. Powell, 8 Tex. 80 (1852); Folts v. Ferguson, 77 Tex. 301, 13 S. W. 1037 (1890).

To the effect that an infant who misrepresents his age and conveys land cannot obtain relief in equity, see Stallard v. Sutherland, 131 Va. 316, 108 S. E. 568, 18 A. L. R. 516 (1921).

In Ferguson v. Bobo, 54 Miss. 121 (1876), a court of equity enjoined the enforcement of a judgment in ejectment, recovered at law by an infant who at the age of nineteen conveyed the land in question to her father, in order to enable him to borrow money from the defendant in the ejectment suit by giving a mortgage on the land to him.

See Watts v. Cresswell, 9 Vin. Abr. 415, where a court of equity held that an infant of twenty years, who solicited a loan from X, representing to him that the lands belonged to the infant's father, and exhibiting to X false title papers in his father's name, and was a witness to a mortgage made by his father to X, could not assert his title against X. Accord: Evroy v. Nicholas, 2 Eq. Cas. Abr. 488 (1733). But see Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87 (1880), infra, p. 232.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or quondam infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or any one asserting claim in his right must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. Roof v. Stafford, 7 Cow. (N. Y.) 179; Hillyer v. Bennett, 3 Edw. Ch. (N. Y.) 222; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428; Smith v. Evans, 5 Humph. (Tenn.) 70; Mustard v. Wohlford, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Grat. (Va.) 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still in esse, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Walsh v. Young, 110 Mass. 396; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Dill v. Bowen, 54 Ind. 204; Phillips v. Green, 5 T. B. Mon. (Ky.) 344; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

We have examined Martin v. Martin, 35 Ala. 560, and think the first principle stated in the opinion is not supported by the authorities cited, or by principle.

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was,

however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and ownership of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.[29]

SIMS v. EVERHARDT.

Supreme Court of the United States, 1880. 102 U. S. 300, 26 L. Ed. 87.

[Bill to set aside a deed made by the complainant while an infant and a married woman. The bill was dismissed.]

Mr. Justice STRONG. * * *

The remaining question is whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted that she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. Brown v. McCune, 5 Sandf. (N. Y.) 224; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or his age adds nothing to what is implied in his deed. An assertion of an estoppel

[29] Accord: Pitcher et al. v. Laycock et al., 7 Ind. 398 (1856).

against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed. * * *

The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion; and it is so ordered.[30]

YOUNG et al. v. DANIEL et al.

Court of Appeals of Kentucky, 1923. 201 Ky. 65, 255 S. W. 854.

Suit by L. Des C. Young and others against K. F. Daniel and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

MOORMAN, J. Appellants filed this suit in the Bourbon circuit court, seeking the rescission of a contract whereby they had purchased from appellees a lease on a coal mine with the equipment thereat for $2,000. The ground for the relief asked was that appellants were infants at the time the contract was made. Before trial they became of age and filed amended petitions adopting the averments of the original petition and asking judgment against appellees for the $2,000 paid under the contract.

Appellees denied that appellants were infants at the time the contract was made, and also pleaded fraudulent misrepresentation and concealment by appellants of their age, inducing appellees to believe they were 21 years old and to enter into the contract; and, further, that appellants entered into the contract to evade military service under the pretense of being engaged in an essential occupation. From a judgment sustaining the first of these affirmative pleas this appeal has been prosecuted.

It was not proven that appellants made any express representation to appellees as to their age, nor, indeed, that appellees made any inquiry in respect to that subject. But it was shown that appellants had the appearance of being more than 21 years of age at the time the contract was made; that they had theretofore been engaged in purchasing coal in that community for a concern located in Louisville; and that one of them represented to appellees that he had been engaged in the coal business with his father and knew the business, and the other represented that he had been in business for himself for some time. It also appears that they examined the mine carefully, made certain conditions upon which they would purchase it, and acted in every respect as if they were men of experience in business and understood what they were doing. In addition to this, there is evidence to the effect that, when it was suggested to them that the attorney who was preparing the contract was a candidate for office and would like to have their votes, neither of them indicated that he was a minor or not old enough to vote. It was further

[30] Cf. Myers v. Hurley Motor Co., 273 U. S. 18, 47 S. Ct. 277, 71 L. Ed. 515, 50 A. L. R. 1181 (1927), infra, p. 236.

shown that they operated the mine until the latter part of 1918, and received the profits from it, but did not pay any royalties, as they were required to do under the contract, and before they abandoned the mine, had destroyed, lost, or disposed of the greater part of the equipment. On this state of facts the trial court held that they were estopped to maintain an action for a rescission of the contract.

It is the general rule that a minor who makes a contract may disaffirm it on arriving at the age of 21. He certainly may do so, as has been uniformly decided, if the other contracting party knew of his minority at the time the contract was made. In some jurisdictions it is held that the infant's false statements as to his age made at the time of entering into the contract, upon which the other party relied, will not defeat his right to avoid the contract when he arrives of age. But in this state it is the rule that a fraudulent misrepresentation or concealment of age which has misled the other party will thereafter estop the infant from avoiding the contract, for, as said in Schmitheimer v. Eiseman, 7 Bush, 298:

"Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor femes covert are privileged to practice frauds upon innocent persons."

It seems to be conceded by counsel for appellants that if there had been an actual representation by appellants that they were 21 years of age, upon which appellees relied, this action could not be maintained.

They contend, however, that no such representation was made, and in view of that fact estoppel cannot be invoked. It is true that in most of the cases in which the doctrine has been sustained as against an infant the record disclosed a specific statement of the infant to the effect that he was 21 years of age, as in Asher v. Bennett, 143 Ky. 361, 136 S. W. 879. But in County Board of Education v. Hensley, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643, after reviewing the earlier decisions of this court it was said:

"When one deals with an infant, knowing him to be an infant, the latter is not estopped from relying upon his infancy in avoidance of the contract; but when an infant by reason of his personal appearance, family surroundings, and business activities, coupled with a misrepresentation or fraudulent concealment, leads one who deals with him, in good faith, and not knowing that he is an infant, to believe that he is of age, he will be estopped from maintaining an action to avoid his executed contract. When he comes into equity seeking relief, he must come with clean hands. The privilege of infancy is a shield for the protection of the infant, and not a weapon of attack; nor is it to be used as a means of defrauding others."

Thus it is that personal appearance, family surroundings, and business activities, coupled with a misrepresentation or fraudulent concealment by the infant leading one who deals with him in good faith and not knowing of his infancy to believe he is of age, will estop him from thereafter maintaining an action to avoid an executed contract. The

fraudulent concealment of a fact for the purpose of deceiving and misleading is the equivalent of a misrepresentation, and it was so ruled in Smith v. Cole, etc., 148 Ky. 138, 146 S. W. 30, where the infant made no statement as to his age, but where his activity in negotiating the contract and his accepting the benefits of it, with his appearance and his family surroundings, induced the other party to believe that he was 21 years of age and to enter into the contract.

But it is said the burden was on appellees to show a fraudulent concealment inducing them to make the contract, which the evidence fails to do. With this statement of law we agree, but we cannot adopt counsel's view of its application to the facts. It is true that appellants testified that they did not, at the time they entered into the contract, know it was necessary for them to be 21 years of age in order to make a valid contract, and they did not fail to divulge their ages for the purpose of deceiving or misleading appellants. This evidence is to be considered in determining whether the concealment was fraudulent, but it must be considered in conjunction with the circumstances under which the contract was made and the degree of intelligence exhibited in appellants' testimony. One cannot read their testimony, given in an unusually intelligent manner, and escape the conclusion that when the contract was made they were not ignorant of the commonly understood rule that a minor cannot enter into a valid and binding contract. Hence we think the evidence as a whole shows that they then knew they could not enter into a legal contract, and, further, that they endeavored to and did deceive appellees as to their age, except for which appellees would not have made the contract.

Nor are we impressed with the suggestion that it will be a hardship on appellants to burden them with the obligations of an unprofitable contract. The question for decision cannot be examined from that point of view. It is one of law and fact. Besides, if profits and loss were to be considered, appellants' claim is still without merit, for the evidence does not show that the contract was unprofitable, but tends to show that appellants received a considerable sum of money from the operation of the mine and paid none of the royalties while they had possession of it. It also shows that they abandoned the mine the latter part of the year 1918, and when appellees took it over much of the equipment that had been turned over to appellants had disappeared. Here again appellants are estopped from maintaining an action to annul the contract, for they have not accounted for the benefits they received under it, and it is a rule of uniform application that an infant, when it is in his power to do so, must restore or offer to restore the property he has received under an executed contract before he can have the contract annulled on the ground of his infancy.

In view of the conclusion stated, it is not necessary to consider whether appellants purchased the lease to evade military service. It may be said, however, that there is no evidence to sustain this contention, and that reliance thereon is seemingly based on the circumstances of the

times. It suffices that appellants' conduct in the negotiations for the property estops them from maintaining an action for a cancellation of the contract.

The judgment is affirmed.[31]

MYERS v. HURLEY MOTOR CO., Inc.

Supreme Court of the United States, 1927. 273 U. S. 18, 47 S. Ct. 277, 71 L. Ed. 515, 50 A. L. R. 1181.

Suit by Clarence H. Myers against the Hurley Motor Company, Inc., wherein defendant counterclaimed. Judgment for defendant, and plaintiff brought error. On certificate from the Court of Appeals of the District of Columbia. Questions answered.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The facts which give rise to the questions of law in respect of which the instruction of this court is asked are set forth in the certificate as follows:

"Clarence H. Myers, plaintiff in error, on the 28th day of April, 1923, then a minor of the age of 20 years, represented to the defendant company that he was 24 years of age, and engaged in the hacking business in the District of Columbia; whereupon he contracted with defendant for a Hudson touring car at the price of $650, upon terms set out in a conditional sales contract. Plaintiff turned in as cash payment a Ford touring car at the price of $250, which was subsequently sold by defendant company for that price. Plaintiff subsequently made payments on the contract to the amount of $156.12, making a total payment on the contract of $406.12.

"On October 3, 1923, plaintiff being in default in his payments, defendant company repossessed itself of the Hudson car, under the terms of its sale agreement. Plaintiff attained the age of 21 years on October 21, 1923, and, on the 1st day of November following, disaffirmed his contract and demanded the return of $406.12, the amount paid upon the contract. Upon defendant's refusal to comply with plaintiff's request, the present suit was brought in the municipal court of the District of Columbia by plaintiff to recover $406.12, the amount paid by him.

"Defendant company set up, as a counterclaim, the amount of $525.96, supported by a bill of particulars, showing that this amount was required in the way of repairs and expense to place the Hudson car in as good condition as it was when sold to plaintiff. The municipal court gave judgment upon defendant's plea of set-off for the full amount of $525.96, from which the case was brought to the Court of Appeals on writ of error.

[31] Cf. First State Bank v. Edwards (Tex. Civ. App.) 245 S. W. 478 (1922). See, however, Correy v. Michaelovitch, 46 R. I. 387, 128 A. 673, 39 A. L. R. 374 (1925); Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N. W. 50 (1910).

"The misrepresentation by plaintiff of his age, supported by evidence that he had the appearance of a man of 24, at the time the contract was made, and the depreciation in the value of the Hudson car from hard and abusive usage, are not denied by plaintiff, and may be accepted for the purpose of this case as conceded facts. Neither does it appear that any deception or misrepresentations were made by the defendant in order to induce the making of the contract, nor that the contract was in any respect an unfair one. Plaintiff rests his case entirely upon his absolute right, on becoming of age, to disaffirm his contract, and recover the amount which he had paid thereon, regardless of any damage the defendant may have sustained, either from his misrepresentation as to his correct age, or from his abusive use of the Hudson car, which resulted in the depreciation above set forth."

Two questions are certified:

(1) Is the plaintiff, by reason of the misrepresentations as to his correct age, estopped from maintaining an action to recover the amount paid under the conditional sales contract upon the purchase price of the Hudson car?

(2) If the plaintiff is not so estopped, may defendant, by way of affirmative defense against plaintiff's claim, set off the amount paid for the repair of the damaged Hudson car, or so much thereof as will equal plaintiff's claim?

First. In Sims v. Everhardt, 102 U. S. 300, 313, 26 L. Ed. 87, which was a suit in equity, this court said:

"Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. Brown v. McCune, 5 Sandf. [7 N. Y. Super. Ct.] 224; Keen v. Coleman, 39 Pa. 299 [80 Am. Dec. 524]. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

The statement that the authorities are all one way in holding that an estoppel in pais is not—that is to say, is never—applicable to infants, at least of doubtful accuracy when made, is clearly incorrect at the present time. A review shows that many, perhaps the major part, of the state decisions, hold that in equity the rule is otherwise. See Bigelow on Estoppel (6th Ed.) 627; 1 Williston on Contracts, § 245. In any event, the most that can be said is that the decisions upon that subject are conflicting and to some degree in confusion. The doctrine of the Everhardt Case, however, was followed in MacGreal v. Taylor, 167 U. S. 688, 696, 17 S. Ct. 961, 42 L. Ed. 326, and has been made the basis of decisions in several of the lower federal courts (Bartlett v. Okla. Oil Co. [D. C.] 218 F. 380, 391; Alfrey v. Colbert [C. C. A.] 168 F. 231, 235; Sanger v. Hibbard [C. C. A.] 104 F. 455, 457), and

has become the established federal rule. Likewise it has been accepted and followed by many of the state courts. See, for example, Tobin v. Spann, 85 Ark. 556, 559, 109 S. W. 534, 16 L. R. A. (N. S.) 672; Cobbey v. Buchanan, 48 Neb. 391, 394, 67 N. W. 176; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 424, 81 P. 869, 4 Ann. Cas. 532; Alvey v. Reed, 115 Ind. 148, 149, 17 N. E. 265, 7 Am. St. Rep. 418. In this state of the matter, we are not disposed now to re-examine the question in the light of the conflict of authority; but, following the Everhardt Case, we hold that the doctrine of estoppel in pais cannot be invoked to defeat plaintiff's action.

Second. While adhering to the determination in the Everhardt Case, that the doctrine of estoppel in pais does not apply to an infant, we are of opinion that this does not require us, under the facts of the present case, to deny defendant the benefit of its affirmative defense. In the Everhardt Case, there was a dismissal by the court below on the ground that it did not appear that there was a disaffirmance by the complainant within a reasonable time after she attained her majority. The bill offered to do equity (page 301 [26 L. Ed. 87]), but this court, in reversing the decree and remanding the cause, expressed no opinion in respect of the equities by which a decree for complainant might be conditioned. The effect of an affirmative defense such as we have here was neither involved nor considered. Whether an infant, who fraudulently misrepresents his age and thereby induces the making of a contract can, when he brings a suit in equity in respect of the matter, be compelled to do equity, is a question not concluded by that decision. In MacGreal v. Taylor, supra, after first calling attention to the fact (page 698 [17 S. Ct. 961]) that the opinion in the Everhardt Case did not deal with the counter equities, this court said (page 700 [17 S. Ct. 965]):

"A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy."

Here the action brought by the quondam infant is one for money had and received—the payments under the disaffirmed contract having been either in money or in property converted into money before the disaffirmance. Such an action, though brought at law, is in its nature a substitute for a suit in equity; and it is to be determined by the application of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff in equity and good conscience is not entitled to recover in whole or in part. Rathbone v. Stocking, 2 Barb. (N. Y.) 135, 145, 147; Barr v. Craig, 2 Dall. 151, 154, 1 L. Ed. 327; Wright v. Butler, 6 Wend. (N. Y.) 284, 290, 21 Am. Dec. 323; Eddy v. Smith, 13 Wend. (N. Y.) 488, 490; Christie v. Durden, 205 Ala. 571, 572, 88 So. 667; Gifford v. Wilcox, 81 Ind. App. 378, 381, 143 N. E. 368.

It has been held that, where an infant, after coming of age, seeks the aid of a court of equity to avoid a contract, under which he has received property, and restore to him the possession of obligations with which he has parted, he will be required, wholly irrespective of his own good faith in the transaction, to do equity, which may extend to compelling him to make full satisfaction for the deterioration of the property due to his use or abuse of it.

In Gray v. Lessington, 15 N. Y. Super. Ct. 257, the plaintiff, alleging her infancy, brought suit to rescind a contract of sale and to cancel a mortgage and unpaid notes. A decree in her favor imposed the condition that she should restore the property and account for the deterioration arising from its use. The court, sustaining this on appeal, said (page 262):

"And when it becomes necessary for her to go into a court of equity to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration. Whether that presumption is, under all circumstances, conclusive, it is not necessary to say, since there is nothing in this case to rebut the presumption. The deterioration here is found to have resulted from the use which she has enjoyed; and, if it resulted from an abuse of the property, the plaintiff's equity is no greater."

The same rule is recognized in Hillyer v. Bennett, 3 Edw. Ch. (N. Y.) 222, 225. In that case, after pointing out that the acts and deeds of an infant are voidable at his election, that if sued at law or in equity he may plead his infancy in bar, and that if he has agreed to sell and deliver personal property he may disaffirm the contract and bring trover to recover it back, the vice chancellor said:

"But if, after he comes of age, he seeks to disaffirm and avoid his contract in a court of equity and files his bill there for the purpose of obtaining its aid, in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back; especially, if it appears that the other dealt with him in ignorance of the fact of his nonage. This equitable and just principle is recognized by Woodworth, J., ([Roof v. Stafford] 7 Cowen [N. Y.] 183), and is warranted by several cases there cited."

See, also, 1 Story's Equity (11th Ed.) § 240; Carmen v. Fox Film Corporation (C. C. A.) 269 F. 928, 931, 15 A. L. R. 1209; Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; International Land Co. v. Marshall, 22 Okl. 693, 708, 98 P. 951, 19 L. R. A. (N. S.) 1056.

How far the equitable maxim, that he who seeks equity must do equity, applies generally in suits brought for relief because of infancy, we need not inquire; nor do we need here to go as far as the authorities just cited. The maxim applies, at least, where there has been, as there was here, actual fraud on the part of the infant. When an infant of mature appearance, by false and fraudulent representations as to his age, has induced another person to sell and deliver property to him, it is against natural justice to permit the infant to recover money paid for the property without first compelling him to account for the injury which his deceit has inflicted upon the other person.

Our conclusion that the affirmative defense is available in this action does not rest upon the doctrine of estoppel, though the result may be the same. It recognizes the plaintiff's right to repudiate his promise and sue for the return of his payments, and his immunity from a plea of estoppel in so doing. Its effect is not to enforce the disaffirmed contract directly or indirectly, but to allow him to invoke the aid of the court to enforce an equitable remedy arising from the disaffirmance only upon condition that, "seeking equity, he must do equity." And the application of the maxim is not precluded because defendant's claim might not be enforceable in any other manner. 1 Pomeroy's Equity, § 386; Sturgis v. Champneys, 5 Myl. & C. 97, 102; Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co. (C. C. A.) 126 F. 46, 51.

The question remains whether defendant should have judgment for the amount by which its expenditures exceeded plaintiff's demand. We are not advised of any statutory rule upon the subject applicable in the District of Columbia; and the matter must be determined in accordance with general principles. The defense, in effect, is that the plaintiff was guilty of tortious conduct to the injury of the defendant in the transtion out of which his own cause of action arose. In such case it is well settled that the relief is by way of recoupment—that is, that the amount of defendant's damage can be allowed only in abatement or diminution of plaintiff's claim—and that defendant cannot, at least in that action, recover any excess. Winder v. Caldwell, 14 How. 434, 443, 14 L. Ed. 487; Dushane v. Benedict, 120 U. S. 630, 642, 7 S. Ct. 696, 30 L. Ed. 810; Ward v. Fellers, 3 Mich. 281, 287, 291; Waterman v. Clark et al., 76 Ill. 428, 430; Holcraft v. Mellott, 57 Ind. 539, 544.

It follows that the first question should be answered in the negative and the second question in the affirmative, with the qualification that the amount allowed defendant shall not exceed the amount of plaintiff's claim.

It is so ordered.[32]

[32] See comment on this case in 21 Ill. L. Rev. 810.

CARMEN v. FOX FILM CORPORATION et al.[33]

Circuit Court of Appeals of the United States, Second Circuit, 1920. 269 F. 928, 15 A. L. R. 1209.

Suit in equity by Jewel Carmen against the Fox Film Corporation and the William Fox Vaudeville Company. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 258 F. 703.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff seeks to have certain contracts declared void which she alleges that she made with the defendants during her minority, and she prays that an injunction be issued restraining the defendants from asserting that the contracts are valid and from interfering with her contract relations with any person, firm, or corporation in employing the plaintiff and availing himself or itself of her services under any contract of employment entered into with her. Damages are also asked.

The court below has adjudged that the contracts were duly rescinded by her and have been null and void since July 15, 1918, and has issued a perpetual injunction as prayed, and awarded her damages in the sum of $43,500.

The plaintiff is a moving picture actress, and in her complaint alleges that at all the times mentioned therein she was and still is a citizen and resident of the state of California. The defendants are corporations organized under the laws of the state of New York, and are each engaged in the business of manufacturing and producing photoplays.

The contract with the Fox Film Corporation, which is one of the contracts the plaintiff repudiated and asks to have declared void, provided employment for a period of one year, commencing October 17, 1919. The compensation agreed upon was $175 per week. In consideration of $1,300, which was to be paid in weekly installments of $25, an option was given to continue the employment for further periods of six months each until said employment extended over to October 17, 1921. The salary stipulated, if the options were exercised, was $200 per week for the first year, $225 per week for the first half of the second year, and $250 per week for the second half of the second year until October 17, 1921, the termination of the contract.

The contract with the William Fox Vaudeville Company which the plaintiff also repudiated, provided employment for six months with the option in the company to employ her for a further six months until the employment extended over to October 17, 1919. The salary, if the options were exercised, was $125 per week for the first six months; $150 per week for the second six months; $200 per week the

[33] Certiorari denied, 255 U. S. 569, 41 S. Ct. 323, 65 L. Ed. 790 (1921).

last six months and until the termination of the contract. The consideration for the several options was $650 for each of the options.

Each of these contracts was executed on July 31, 1917, and in each of them the plaintiff is described as of the city of Los Angeles in the state of California.

Prior to the plaintiff's repudiation of the agreements above mentioned and while they had still several years to run, and on March 28, 1918, a few months before she attained her majority, the plaintiff entered into a contract with the Frank A. Keeney Pictures Corporation for her exclusive appearance in motion pictures under its employment for a period of two years commencing on or about July 15, 1918. Under this agreement the Keeney Corporation was to pay to the plaintiff at the end of each week for 46 consecutive weeks the sum of $450. And for the first six months during the year commencing July 15, 1919, she was to be paid $500 for each week, and for the last six months she was to be paid the sum of $550 per week. The contract also gave to the Keeney Corporation an option on her exclusive motion picture services for one year commencing July 15, 1920, the corporation agreeing to pay her if it availed of the option $600 per week for the first six months, and $650 per week for the last six months. The contract also provided that the corporation should have a further option for her exclusive services for the year commencing July 15, 1921, her compensation to be $700 per week for the first six months, and $750 for the last six months. It granted the corporation a further option for the year commencing July 15, 1922, the compensation for the first six months to be $800 per week, and for the last six months $850 per week. It granted the corporation the further option for the year commencing July 15, 1923, her compensation to be $1,000 per week for each and every week.

The negotiations leading up to the signing of the agreement with the Keeney Corporation were opened by Frank A. Keeney, the president of that corporation, who telegraphed the plaintiff asking whether she was open to an engagement. Her reply was that she was free to accept employment. Thereupon he sent to her the contract as prepared. It was submitted by her to her attorney in Los Angeles, and then was signed by her in California. At the time this contract was made Keeney had no knowledge that the plaintiff had contracts with these defendants extending beyond July 15th, and if he had known the facts he would not have made any contract with her. When later on Keeney learned what the facts were, he having been informed by Fox that his corporations had contracts with the plaintiff which still had several years to run, he refused to recognize the contract which he had made or to proceed under it. He testified:

"I would have entered into no negotiations with Miss Carmen unless I thought that she was absolutely free to come to me on July 15th,

free and clear in every manner, shape, or form without any technicalities."

He also testified:

"* * * I wanted Miss Carmen's services, but I didn't want her services if there was any litigation about it; that is what I was trying to keep out of, that is, litigation."

It appears that defendants on receipt of the plaintiff's notification of her repudiation of her contracts with them, on the ground of her infancy, instructed their lawyers to inform the plaintiff that they intended to hold her to the performance of the contracts, and that they would seek adequate and proper relief to restrain the violation thereof. This information they communicated to her on July 17, 1918. And on July 12, 1918, the William Fox Vaudeville Company, through its attorneys, had informed Keeney as follows:

"We hereby serve you with notice that we still claim our rights to her services under her contract, and that we will hold her strictly to the performance of her contract, and will hold you if you permit her to breach her contract by performing any services for you.

"We are giving this notice to you in advance of her rendering any services for you, so that, if you engage her services after this notice, you will do so with full knowledge of all the facts."

On September 19, 1918, the William Fox Vaudeville Company and the Frank A. Keeney Pictures Corporation and Frank A. Keeney entered into an agreement wherein the Keeney Corporation and Frank A. Keeney agreed to refrain from engaging the services of the plaintiff pending the determination of the rights of the respective parties, and the Fox Company agreed to indemnify and save harmless the Keeney Corporation and Keeney himself from any damage they might suffer by reason of any action the plaintiff might bring against them.

The plaintiff in her complaint alleged that the contracts with the defendants were signed, executed, and delivered to the plaintiff by the defendant in the city and state of New York. The answer does not deny this allegation. But the defendants claim that in fact the contracts were executed in California, and that under the law of that state they were binding upon her, as in California a young woman becomes of age at 18. Under the New York law a young woman does not become of age until she reaches 21. The court below, in view of the allegation in the complaint and the failure in the answer to deny it, has held that the contracts between the plaintiff and the defendants were New York contracts and governed by the New York law, and therefore voidable, as under New York law the plaintiff was not of age when she signed them. It is contended that this was error, and that the capacity of parties to contract is to be determined by the law of the domicile, or, according to some authorities, by the law of the place of performance. In the view we take of this case it is not material whether the contract was binding and breached, or voidable and avoided. In either case the conduct of the plaintiff has been such

as entitles her to no relief in this court. According to her own allegations in her complaint, she was a minor when she entered into the contract with Keeney, and she misled him into making the contract by representing that she was free to make it, when in fact she was morally not free to make the contract, and there was doubt whether she was legally free to make it. If the contracts with defendants were valid, she was under a legal and moral obligation not to make the contract with the Keeney corporation. And if the contracts were voidable because of her infancy, then, while she was under no legal obligation to recognize them, she was under a moral obligation to abide by them, and good faith required her to continue to render the services she had agreed to give. In either case her action in repudiating her pledged word was misconduct of which no person of honor and conscience would have been guilty. That no action could be brought against her at law because of what she did does not alter the moral character of her act. And when she comes into a court of conscience and asks its affirmative aid to assist her in carrying into effect the inequitable arrangement into which she unfaithfully entered, the appeal falls on deaf ears. One who comes into equity must come with clean hands, and her hands are not clean. The testimony discloses that reliance cannot be placed upon her agreements which the law does not oblige her to keep, and that for a money gain to herself she unscrupulously disregarded her express contracts. * * *

In Weeghman v. Killefer (D. C.) 215 F. 168, the complainants sought an injunction to restrain the defendant from playing baseball with any club other than their own. It was found by the court that he was a player of unique, exceptional, and extraordinary skill. But complainants, knowing that he had entered into an unenforceable agreement to play as a member of another club, had induced him by the offer of a larger salary to break his agreement and play with their own club. Then he was induced to repudiate the agreement with the complainants and to enter into a new agreement to play with the club with which he had originally contracted. An injunction was sought by complainants to restrain him from doing so. This was refused on the ground that complainants' conduct in inducing him to break his unenforceable agreement was such misconduct in regard to the matter in litigation as honest and fair-minded men would condemn and pronounce wrongful, and, although insufficient to constitute the basis of legal action, was quite sufficient to bar relief in equity. The complainants' hands were not clean. The case was appealed to the Circuit Court of Appeals for the Sixth Circuit and was affirmed, 215 F. 289, 131 C. C. A. 558, L. R. A. 1915A, 820. * * *

In 1859 in a case before the Court of Appeals in Chancery, Nelson v. Stocker, 4 De Gex & J., 458, 464, Lord Justice Turner, in commenting on the fact that the defendant had represented himself to be of age when he was not of age, said:

"It is too much to call upon the court to believe that this defendant

could really have thought himself to be of age at the date of the settlement, when he was under 18 years of age; and if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults are to gain benefits to themselves by fraud. * * *"

In 1816 a case came before Vice Chancellor Plumer, Cory v. Gerteken, 2 Maddox, 40, in which an infant who was nearly of age prevailed upon his trustees to transfer to him certain stock to which he was entitled on coming of age, and represented to them that they ran no risk in doing it. After coming of age he assigned his rights to an assignee, and suit was brought against the trustees on the ground that payment to an infant was bad. The bill was dismissed and the Vice Chancellor said:

"The concealment of his infancy, under such circumstances, certainly was a fraud, and precludes him, or his assigns, who stand precisely in his situation, from calling for a repayment."

The fact that a contract has been dishonestly or dishonorably obtained is a bar to relief in equity.

Decree reversed.[34]

MacGREAL v. TAYLOR.

Supreme Court of United States, 1896. 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326.

Bill in equity to foreclose a mortgage executed by Mrs. Moore (now Mrs. MacGreal) to Mrs. Utermehle, dated October 22, 1889. The execution of this mortgage was consummated pursuant to an agreement between Mrs. Moore and Mrs. Utermehle. Mrs. Moore was in default in respect of the payment of the sum secured by certain prior trust deeds, dated, respectively, 1886 and 1887, upon which foreclosure and sale were threatened, and having no property except the premises in question, and desiring also to improve the same by the erection of a substantial building for the purposes of a home, applied to Mrs. Utermehle for a loan of $8,000, to be secured by a trust deed in the usual form on the land and premises.

She represented the title to the premises to be good and unincumbered otherwise than by the above trust deeds. Her application, the bill states, was accompanied by an assurance upon her part that she would immediately commence the construction of a substantial brick

[34] Cf. Carmen v. Fox Film Corporation, 204 App. Div. 776, 198 N. Y. S. 766, where the court held that an action at law could be maintained by the plaintiff in the principal case for interference by the defendant with her employment by the Keeney Corporation.

Some of the problems peculiar to infants' contracts relating to services are considered infra, p. 275, ff.

building upon the lot and premises, with suitable provisions to secure the payment or application of all the proceeds of the loan "not required to take up the said overdue notes, representing said unpaid purchase money, taxes then due, expense of examination of title to said land and premises, conveyancing and other incidental expenses incurred on account of the negotiation of said loan, all of which were also to be taken up or paid therefrom towards such construction." Relying upon said premises, and the proposed security offered by her, $8,000, was loaned by Mrs. Utermehle to Mrs. Moore. Out of that sum, pursuant to the agreement or understanding between Mrs. Moore and Mrs. Utermehle, the latter took up the notes representing the unpaid purchase money secured by the above trust deeds, and paid the taxes then due on the property, together with the expense of examining the title and other expenses, all amounting to $3,291.99, which sum was paid directly by Mrs. Utermehle to the holders of the notes and the parties to whom the expenses and taxes were payable. Thereupon Mrs. Moore procured the services of J. W. Myers, a builder, and entered upon the construction of a substantial brick dwelling upon the lot and premises, as agreed upon, and as the condition of the loan to her, and the balance of the $8,000 was expended in the purchase of materials furnished for and used in its construction, and to pay laborers, mechanics, and others for work done thereon. The house was completed, and is known as "No. 1612 Nineteenth Street Northwest." Mrs. Moore moved into it about two months after its completion.

Subsequently, on the 23d of June, 1890, Mrs. MacGreal executed and placed of record an instrument, in which she gave notice that she disaffirmed the deed of trust of October 22, 1889, and the note described in it, on the ground of her minority at the time of its execution. There were other acts of disaffirmance.

It is not disputed that Mrs. MacGreal arrived at full age on the 20th day of June, 1890. And it may be stated, as the result of the testimony, that when the deed of October 22, 1889, was executed, no inquiry was made as to her age, nor did she make any representation on that subject.

In the Supreme Court of the District of Columbia a decree was rendered dismissing the bill. But in the Court of Appeals of the District that decree was reversed, and a decree passed which adjudged that there was due from Mrs. MacGreal to the executrices of Mrs. Utermehle the sum of $8,000, with interest at the rate of six per cent. per annum until paid, and the costs of suit; and directing that, on default in the payment of principal, interest, and costs aforesaid by a day named, the lot in question, with the improvements thereon, be sold, and the proceeds applied in payment of such sum. Utermehle v. McGreal, 1 App. D. C. 359.[35]

[35] Statement abridged from the opinion.

Mr. Justice HARLAN [after stating the case and commenting upon Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345, and Sims v. Everhardt, 100 U. S. 300, 26 L. Ed. 87, continued:]

In the present case it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable, and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied, and was applied, in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, and cannot be returned.

[The court then cited Boyden v. Boyden, 9 Metc. 519, 521, Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233, and other cases, and continued:]

If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will devest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589. Or, if he retains the use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden v. Boyden, 9 Metc. (Mass.) 519; Robbins v. Eaton, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. Dana v. Stearns, 3 Cush. (Mass.) 372–376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in statu quo. Tucker v. Moreland, 10 Pet. 65–74, 9 L. Ed. 345; Shaw v. Boyd, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368. See, also, 1 Am. Lead. Cas. (5th Ed.) *224, *232, *249, *259; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 340, 76 Am. Dec. 209; Cresinger v. Welch's Lessee, 15 Ohio, 156, 45 Am. Dec. 565; Eureka Co. v. Edwards, 71 Ala. 248,

256, 46 Am. Rep. 314; Corey v. Burton, 32 Mich. 30; Price v. Furman, 27 Vt. 268, 271, 65 Am. Dec. 194; Robinson v. Weeks, 56 Me. 102, 107; Carpenter v. Carpenter, 45 Ind. 142, 146; Harvey v. Briggs, 68 Miss. 60, 66, 8 South. 274, 10 L. R. A. 62; Railway v. Higgins, 44 Ark. 293, 297; Reynolds v. McCurry, 100 Ill. 356, 359; Tyler, Inf. § 37, and authorities cited.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between herself and the estate of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was incumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts, when the deed of 1889 was executed, cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8,000 to be used in meeting those debts and in improving the lot in question. 1 Jones, Mortg. §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held —and gross injustice will be done in this case if it be not so held— that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.

But we are of opinion that the court below erred in adjudging, as, in effect, it did adjudge, that the appellees are entitled to have their entire debt first paid, even if all the proceeds of sale be required for that purpose. The decree should have been so framed as to place Mrs. MacGreal, so far as it could be done, in the position occupied by her at the time the deed of trust was given; for only by such a decree can the privilege of infancy, resulting from incapacity to contract, be effectively protected. A decree giving the appellees a preference in the distribution of the proceeds of sale for their entire claim necessarily must rest upon the ground that one who obtains from an infant a deed of trust conveying his real estate to secure the repayment of money loaned to him, and to be applied, and which is applied, in improving such estate, may thereby make the disaffirmance of the infant ineffectual in every case where the property, upon being sold, does not bring more than the debt attempted to be secured. But no such result can properly happen if the court enforces the established rule that, upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance. As Mrs. MacGreal ought not to hold the property in its improved state without accounting, as far as possible, for the money used in protecting it from sale for existing liens, and in improving it, there must be a sale in order that justice may be done. But as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her of the interest she had at the time the deed of trust was executed.

The decree for a sale was proper, but, upon the showing made by this record, it should direct the proceeds to be applied—First, in repaying to the appellees, with interest, the sums paid by Mrs. Utermehle in discharge of the prior liens created by the deeds of 1886 and 1887 and by the taxes then upon the property; second, in paying Mrs. MacGreal an amount equal to the value of the lot at the institution of this suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with Mrs. Utermehle's money. Lynde v. McGregor, 13 Allen, 182, 185. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured. If the property, in its improved condition, does not bring enough to pay the whole debt due the appellees, they will be without remedy for the deficiency. If any balance should remain after satisfying the above claims in the order mentioned, it will belong to Mrs. MacGreal.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed.[36]

The CHIEF JUSTICE and Mr. Justice BROWN are of opinion that the judgment should be affirmed.

WHITMAN v. ALLEN.

Supreme Judicial Court of Maine, 1923. 123 Me. 1, 121 A. 160, 36 A. L. R. 776.

On report, action by Arthur Whitman against Mark Allen. Judgment ordered for plaintiff.

CORNISH, C. J. The case here presented on report is that of a minor who had made two separate and independent trades with the same party, one an exchange of personal property and the other a mortgage of personal property as security for money borrowed. After attaining his majority, the minor disaffirmed both trades by bringing this suit to recover the value of the property transferred to the defendant without restoring or offering to restore or to be accountable for the property received by him in exchange in the first instances, or the money received in the second. His action is based upon his infancy. Another claim, that of plaintiff's mental incapacity, was raised and pressed; but the evidence fails to substantiate it, and that issue may be disregarded, leaving only the question of infancy for consideration.

It might be questioned whether the plaintiff's rights, if any, could technically be established in this form of action, which is assumpsit with an account annexed for the value of the goods exchanged and with a common count for goods sold and delivered. There is force in the defendant's contention that if the contracts were voidable by reason of infancy, title never vested in the defendant, or, if it vested, it was a conditional vesting subject to being divested, and, upon disaffirmance, the plaintiff's remedy would be by replevin if the property were still in the defendant's possession, or by trover if he had disposed of it.

But when a case is submitted to the law court on report, all technical questions of pleading are deemed to be waived unless the contrary appears. Pillsbury v. Brown, 82 Me. 450, 19 A. 858, 9 L. R. A. 94; Elm City Club v. Howes, 92 Me. 211, 42 A. 392; Rush v. Buckley, 100 Me. 322, 61 A. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; Robbins v. Railway Co., 100 Me. 496, 62 A. 136, 1 L. R. A. (N. S.) 963. The contrary does not appear here, the certificate of the presiding justice being in the usual form. We may therefore consider and determine the

[36] Accord: United States Inv. Corp., Limited, v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326 (1901); Berry v. Stigall, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. (N. S.) 489, Ann. Cas. 1915C, 118 (1913); Chandler v. Jones, 172 N. C. 569, 90 S. E. 580 (1916), semble. See Thurston v. Nottingham Permanent Benefit Bldg. Society, [1902] 1 Ch. 1. But see N. Y. Bldg. Loan & Banking Co. v. Fisher et al., 23 App. Div. 363, 48 N. Y. S. 152 (1897), supra, p. 160. Cf. Wyatt v. Lortscher, 217 App. Div. 224, 216 N. Y. S. 571 (1926).

rights of the parties independent of technical pleading and view the action as equitable in its nature, the defendant in equity and good conscience being asked to account for the value of the property transferred to him under a voidable contract since disaffirmed.

The essential facts are these: The plaintiff was born on October 17, 1899, and attained his majority on October 17, 1920. During the summer and fall of 1919 he was living in Woodstock and was engaged in the business of buying, butchering, and selling cattle, sheep, and hogs, conveying many of them to Auburn. The defendant is a retail merchant at Bryants Pond, having resided there many years. He had known the plaintiff well and had given him credit at various times for goods purchased at his store.

First Transaction.

In August, 1919, the plaintiff bought a secondhand Ford, known in this case as the "red truck," from Ripley and Fletcher, at the agreed price of $600, paying $100 in cash and giving his father's note for the balance, which note the father subsequently paid. In the early part of October, 1919, he took this truck after a season of very hard usage to a garage in Bethel for repairs. Later in the same month he went to the defendant and solicited him for an exchange of the red truck, still in the garage, for a lighter truck owned by the defendant. This lighter truck with its repairs stood the defendant about $450 or $500. They made an exchange, the defendant giving the plaintiff in addition to his light truck a store account against him amounting to about $50. The defendant paid a substantial repair bill on the red truck so that the trade would seem to be a fair one on both sides, the plaintiff's truck in its unrepaired condition being worth no more than the defendant's truck plus the discharged store account. The plaintiff exchanged the light truck the next day with one Stevens for a horse.

Second Transaction.

On the evening of October 18, 1919, a second transaction took place. The plaintiff solicited the defendant for a loan of $200, giving his Holmes note for that amount secured by a Ford touring car then in a garage for repairs. This car he had obtained from his father at an agreed price, before being damaged, of $350, but had never paid for it. The defendant made the loan, giving the plaintiff $100 in cash and a check for $100, and taking the Holmes note and the car. Defendant also paid the repair bills on this car amounting to $125, of which amount $96.89 had been incurred on Whitman's credit before the trade, and the balance on Allen's credit after the trade. Allen took the car home, commenced but did not complete foreclosure proceedings, used it for about a year, and then sold it to one Littlehale.

We will consider the legal rights of the parties in these two transactions separately.

The single legal problem in the first exchange is whether the plaintiff can recover in this action the full value of the red truck and not

account for or give credit for the value of what he received, the small truck and the store account, a part of which was for necessaries.

At common law the minor was conceived to be a person needing legal protection because of his inexperience and improvidence. From these he must be saved. Hence it was held that the contracts of a minor except for necessaries were voidable on his part and could be rescinded or disaffirmed by him either during his minority or within a reasonable time thereafter.

Our statute has gone a step further, and in an action against a minor requires the ratification, if one is claimed, to be in writing, viz.:

"No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty one years, except for necessaries, or real estate of which he has received the title and retains the benefit." R. S. c. 114, § 2, originally Public Laws 1845, c. 166.

This statute applies only in suits brought against a minor, where he is acting on the defensive. It has no application where one acts on the offensive and seeks to recover the consideration paid by him on a contract made during minority. Hilton v. Shepherd, 92 Me. 160, 42 A. 387. It therefore is beside the pending case and we may decide this cause upon general legal principles.

As to the obligation to return or account for the consideration received by the minor, upon his repudiation of an executed contract there is a diversity of authority.

New Hampshire has adopted a broad rule, namely, that a person seeking to avoid an executed contract on the ground of infancy must account for what he has received under it, by restoring or paying the value of whatever remains in specie within his control and allowing for the benefit derived from whatever cannot be restored in specie. Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 200; Bartlett v. Bailey, 59 N. H. 408; Stack v. Cavanaugh, 67 N. H. 149, 30 A. 350; Wooldridge v. Lavoie, 79 N. H. 21, 104 A. 346.

Minnesota has adopted a somewhat similar rule, which is stated as follows:

"If the party dealing with the infant is guilty of actual fraud or bad faith, the infant is allowed to recover back what he has paid without making restitution except as to the extent to which he retains in specie that which he has received. Such a case would be a contract essentially improvident, calculated to facilitate squandering the infant's estate. But if the contract was free from any fraud or bad faith and otherwise reasonable, fair and a provident contract for the infant, the latter may recover back what he has parted with, but must restore what he has received in the way of benefits. The one dealing with an infant is charged with the burden of proving that the contract was in all respects fair and reasonable, not tainted with fraud, undue influence or overreaching on his part." Berglund v. American Multigraph Sales

Co., 135 Minn. 67, 160 N. W. 191; Braucht v. Graves-May Co., 92 Minn. 116, 99 N. W. 417.

The reason given for these rules is that minors should not be permitted to use the shield of infancy as a cover, or turn it into a sword with which to injure others dealing with them in good faith.

The overwhelming weight of authority, however, holds to a somewhat narrower rule, which is that if an infant when he seeks to avoid a sale of property by himself has in his possession the specific property which came to him under the contract, or any part of it, he must return it or account for it as a prerequisite to the recovery of the amount paid by him, unless he has wasted, consumed, or destroyed it, rendering restoration impossible. The reason on which this rule is based is well stated in a recent case:

"To say that he [the minor] shall not have the protection by disaffirmance, with which the policy of the law seeks to guard him, unless he has had sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion." McGuckian v. Carpenter, 43 R. I. 94, 110 A. 402, 16 A. L. R. 1473.

Or as stated more concisely in an early case in this state:

"If he had received property during infancy and had spent, consumed, or wasted, or destroyed it; to require him to restore it, or the value of it, upon avoiding the contract would be to deprive him of the very protection, which it is the policy of the law to afford him." Boody v. McKenney, 23 Me. 517, cited with approval in Nielson v. International Text-Book Co., 106 Me. 104, 75 A. 330, 20 Ann. Cas. 591.

The Rhode Island case, McGuckian v. Carpenter, supra, is reported in 16 A. L. R. with an extended annotation giving the large number of states in which this rule prevails. Among these it counts Maine, citing as authority therefor Nielson v. International Text-Book Co., 106 Me. 104, supra.

Prof. Williston, in his recent monumental work on Contracts, after stating the various rules with a large number of citations, has this to say by way of approval of the Minnesota and New Hampshire rules:

"In Minnesota and New Hampshire the ordinary rule prevailing in regard to necessaries has been extended so far as to hold an infant bound by his contracts, where he fails to restore what he has received under them, to the extent of the benefit actually derived by him from what he has received from the other party to the transaction. This seems to offer a flexible rule which will prevent imposition upon the infant, and also tend to prevent the infant from imposing to any serious degree upon others." Williston, Contracts, vol. 1, § 238.

In our opinion the Minnesota and New Hampshire doctrine is an actual practice in most instances the more equitable, while the almost universal rule is the more logical. This prevailing rule, however, can be administered in an equitable manner if we fully comprehend and ap-

preciate its spirit and meaning, and extend the doctrine of restoration so that it may include not only the specific property received by the minor, but in case the minor has exchanged that original property for other property the latter may take the place of the original and come under the same obligation.

To illustrate the working of this extended rule: Suppose a minor exchanges personal property with an adult and then squanders the property he received in exchange. On attaining majority he disaffirms the contract and seeks to recover the value of the goods he parted with. He can do this because his improvidence in wasting the fruits of his trade imposes no more burden of restoration than does the squandering of money received on a loan for which a note is given. It is simply the result of the improvidence of infancy which the law has always in mind. If, however, the minor may not have the specific property received by him, has neither wasted, consumed, nor destroyed it, but has parted with it for a valuable consideration and has its value or any part of it either in money or bank deposits or securities, or in other property, why should not the duty as to accountability attach to the substitute or equivalent as firmly as to the original, and why should not the minor account for it on avoiding the contract? The same reason that impresses the original impresses the substitute. No question of improvidence or immature folly is involved. It carries out precisely the same principle of fair dealing as the required restitution of the specific property. That principle compels the infant to account for benefits actually received and still possessed, and it can make no difference in what form they may happen to exist. The minor is not harmed by the extended rule any more than by the accepted rule. In fact, it is the generally accepted rule a little more widely applied. All the rights to which the minor is entitled are fully protected and at the same time justice is done to the other contracting party. To hold otherwise would be morally wrong, and what is morally wrong ought not to be legally right.

A leading federal case recognized the general principle, but the point was raised that the money received by the infant did not exist in specie, and therefore could not be restored, but had been expended in improvements; and the Supreme Court of the United States disposed of this contention in no uncertain language:

"And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held—and gross injustice will be done in this case if it be not so held—that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice

substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong." MacGreal v. Taylor, 167 U. S. 688, 701, 17 Sup. Ct. 961, 42 L. Ed. 326. * * *

In Nielson v. International Text-Book Co., 106 Me. 104, 75 A. 330, 20 Ann. Cas. 591, suit was brought by a minor to recover money paid in advance on a contract whereby the defendant was to furnish him with a correspondence course in electrical engineering. The plaintiff returned the books received by him, but the instruction received could not be restored. The court sustained the action holding that restoration of the tangible had been made, of the intangible could not be made, and the legal requirements had been satisfied.

The case at bar calls for the application of what we conceive to be the true rule. The trade was fair and equitable and free from all fraud, imposition, or overreaching on the part of the defendant. The only evidence of fraud is the false representation made by the plaintiff to the defendant that he was of age and had a right to trade. Such a false statement on the minor's part is held not to create an estoppel. Merriam v. Cunningham, 11 Cush. (Mass.) 40; Knudson v. General Motorcycle Sales Co., 230 Mass. 54, 119 N. E. 359; Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676; Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678. But there are well-considered cases to the contrary. 14 R. C. L. p. 242, and cases cited.

It appears from the evidence that the plaintiff received full consideration for the truck he exchanged. That consideration consisted of a receipted bill for goods, many of which were necessaries for which he would be legally liable in any event, and the contract for all of which he now affirms because he admits on the stand that he was owing the account. That receipted bill, or the receipt for the bill, he must still have in his possession and he could restore it.

The light truck the plaintiff exchanged with a third party the next day after his trade with the defendant, for a horse, and so far as the evidence discloses his ownership continued and he still has the horse. We think the burden of proof rests on the plaintiff, if he would excuse or explain his failure to restore, to show the reason for such failure, The sequence of events requires it. The plaintiff sues to recover property disposed of during minority under a contract never affirmed. The defendant admits the infancy, but proves that he transferred to the plaintiff valuable consideration therefor, either in the form of specific articles or in money. He is not obliged to follow the transaction further. The plaintiff knows what became of that consideration and can testify to it. The defendant is not supposed to know. The law says that the plaintiff must restore the specific benefits received by him or their substitutes or equivalents if still in his possession or control. If he does not restore, it is his duty to explain the reason therefor. In the absence of such explanatory evidence, he must be charged with the

value of what he received or of its substitute; that is, the value still in his possession in another form. There has been restoration in this case neither of the receipted bill nor of the horse, and no excuse is offered. We therefore find no basis for recovery in this action based upon the first transaction, because the consideration and benefits received are still held by the plaintiff either in the original or the substituted form, and are of equal value with the truck for whose value he sues.

On the second transaction the plaintiff received the sum of $200, $100 by check and $100 in cash. He now seeks to recover the value of the touring car which in its disabled condition we find from the evidence to have been worth $200. What did the plaintiff do with the consideration he received? He testified that he gave the check to a third party in payment of garage bills, and of course that could not be restored. His evidence affords an excuse for nonrestoration. What became of the $100 in cash? On this he gives no explanation. However, it does appear that when he became of age on October 17, 1920, he had from $300 to $500 in money. This may have included the $100 in cash received from the defendant. The plaintiff has not shown that it did not, and, as we have already stated, the burden was on him to show facts justifying a legal reason for nonrestoration. He has not done so. We therefore think that under the rule he should be charged with this $100 to be allowed in offset to his claim of $200, the value of his car exchanged with the defendant, leaving a balance of $100 in his favor.

The entry will therefore be:

Judgment for plaintiff for $100, with interest from date of the writ and costs.[37]

BERGLUND v. AMERICAN MULTIGRAPH SALES CO.

Supreme Court of Minnesota, 1916. 135 Minn. 67, 160 N. W. 191.

Action by Fred W. Berglund against the American Multigraph Sales Company. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals. Reversed, with directions.

BUNN, J. On April 9, 1912, plaintiff was a minor of the age of 19 years. On that day he entered into a written contract with defendant for the purchase of a multigraph and accessories for the price of $475, which plaintiff agreed to pay as follows: $100 in cash when the goods were delivered, $120 in six monthly installments of $20 each, and the

[37] Accord, as to burden of proof as to whether the infant still has any of the consideration, Bell v. Burkhalter, 176 Ala. 62, 57 So. 460 (1912). Contra: Manning v. Johnson, 26 Ala. 446 (1855), supra, p. 211; Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788 (1905). See, also, St. Louis, I. M. & S. Ry. Co. v. Higgins, 44 Ark. 293 (1884); Napier v. Chappell, 62 S. W. 21, 22 Ky. Law Rep. 1904 (1901).

balance in six monthly installments of $42.50 each. The contract was a so-called conditional sale contract, containing the usual provisions to the effect that title to the goods should remain in defendant until the purchase price was fully paid, and that defendant should have the right to take possession of the goods upon the failure of plaintiff to pay any installment when due, or to perform any other term or condition of the contract. The contract provided that in such case all payments theretofore made by the purchaser should be considered made for the use of the goods during the time they remained in the purchaser's possession.

The multigraph and accessories were delivered to plaintiff April 9, 1912. He paid $100 in cash on that day; and made the May, June, and July payments, aggregating $60.60. Plaintiff had rented an office, and undertook to do multigraph and stenographic work for the public on his own account. The business did not come, and shortly after making the July payment, plaintiff locked up his office, and procured a job as stenographer elsewhere. Defendant's manager, discovering that plaintiff had given up his business, communicated with him with the result that the multigraph and accessories were taken back by defendant. After he became of age plaintiff brought this action to recover the sum of $160.60, the amount of the payments made by him. The complaint stated the facts substantially as above, and alleged that plaintiff had disaffirmed the contract and brought the action as soon as he was aware of his rights. The answer contained a general denial, alleged the contract and its provisions, the failure of plaintiff to make the payments required, and the surrender and return of the goods to defendant. It further alleged that plaintiff surrendered all payments made on the contract as payment for the use of the goods while in his possession, and that the reasonable value of such use was the sum of $160. The reply was a general denial.

The case was tried to a jury. The court charged in substance, that if the contract was not a fair, reasonable, and provident one, plaintiff was entitled to recover all that he paid under it, but that if the contract was fair, reasonable, and a provident one, plaintiff was only entitled to recover the difference between the amount of his payments and the benefits he received under the contract. The jury returned a verdict for plaintiff in the sum of $62. Plaintiff then moved for judgment in his favor notwithstanding the verdict for the full sum of $160.60 with interest, or, in the alternative, for a new trial. This motion was denied, and plaintiff appeals.

Plaintiff insists that he is entitled to judgment as a matter of law for the full amount of all payments made without any deduction for benefits received from the use of the multigraph and accessories while they were in his possession. This claim is based upon two grounds: (1) That there was no pleading or proof that the contract was fair, reasonable, and a provident one for plaintiff to enter into. (2) That there

was no evidence that he received any benefits from the contract; the evidence received being directed to the reasonable market value of the use, or rental value of the property, rather than to the amount of benefit received by plaintiff.

1. The contract in this case was partly performed on both sides. Defendant had delivered the machine and accessories to plaintiff, and he had made payment therefor in part. The law applicable to such a case is settled by our decisions. If the party dealing with the infant is guilty of actual fraud or bad faith, the infant is allowed to recover back what he has paid without making restitution except to the extent to which he retains in specie that which he has received. Such a case would be a contract essentially improvident, calculated to facilitate squandering the infant's estate. But if the contract was free from any fraud or bad faith and otherwise reasonable, fair, and a provident contract for the infant, the latter may recover back what he has parted with, but must restore what he has received in the way of benefits. The one dealing with an infant is charged with the burden of proving that the contract was in all respects fair and reasonable, not tainted with fraud, undue influence, or overreaching on his part. Johnson v. Northwestern Mutual Life Insurance Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; Alt v. Graff, 65 Minn. 191, 68 N. W. 9; Braucht v. Graves-May Co., 92 Minn. 116, 99 N. W. 417; Klaus v. Thompson Auto & Buggy Co., 131 Minn. 10, 154 N. W. 508. In the last case cited Mr. Justice Holt quotes from the dissenting opinion of Chief Justice Gilfillan in the Johnson Case as to the sense in which the words "reasonable" and "fair" are used in the above decisions. In brief, the contract, to be "fair" and "reasonable" must not be one wasting the infant's estate, but must be a provident one, advantageous to the minor.

2. We do not agree with plaintiff's contention that it was necessary for defendant to plead in its answer the provident character of the contract. Defendant was charged with the burden of proof on this issue. Such is the law in this state established by a majority of the court in the Johnson Case. But to plead the absence of fraud or that the contract was a provident one for the minor would not add to the knowledge of plaintiff that this issue was in the case. We find no case holding it necessary to set up this defense in the answer, and hold that it is not.

3. Nor can we sustain the contention that there was no evidence to support the verdict on this issue. The machine was purchased for business purposes, not for pleasure. Plaintiff was nearly of age, had experience as a stenographer, and expected to make a success of his business venture. His father was apprised of his undertaking and apparently made no protest. There is no evidence of fraud, undue influence, or any unfair practice on the part of defendant in inducing plaintiff to enter into the contract. We think the jury was justified in find-

ing that the contract was not an improvident one, calculated to waste the infant's estate. That plaintiff did not in fact make a success of his venture was not necessarily or even probably due to the nature of the contract, or to the fact that plaintiff was under age.

4. In finding a verdict for $62, instead of for the full amount of the payments made by plaintiff, the jury evidently deducted $100 as the reasonable value of the use of the machine and accessories while in plaintiff's possession. But we think that the jury applied the wrong test, were probably forced to do so under the evidence admitted and the charge of the court. Plaintiff was obliged to account for the benefits received from the use of the goods. This would be the benefits received by him, not necessarily the market value of such use or the rental value of the goods. The cases above cited seem to establish this proposition, and it is logically correct. The allowance of $100 made by the jury was too great. On the other hand the evidence warranted some allowance for benefits received by plaintiff. The amount involved is so small that the case should not be tried again if it can be avoided. We think that a deduction of $30 for the benefits received by him is about all the evidence warrants.

The order appealed from is reversed, with directions to enter judgment below in favor of plaintiff and against the defendant for the sum of $130.60 and interest.

WOOLDRIDGE v. LAVOIE.

LAVOIE v. WOOLDRIDGE.

Supreme Court of New Hampshire, 1918. 79 N. H. 21, 104 A. 346.

Actions, one by Wilbur W. Wooldridge against Arthur Lavoie, and one by Arthur Lavoie, by his father, Peter Lavoie, against Wilbur W. Wooldridge. Causes transferred. Exceptions overruled.

Assumpsit. The first action is to recover the balance due on the purchase price of an automobile; the second, to recover back the part of the purchase price already paid. Trial by the court. Verdict for the defendant in the first action, and for the plaintiff in the second for $210. The court found that Wooldridge sold Lavoie the car for $275, and that it was fairly worth that sum at that time. Lavoie paid him $200 at the time of the sale, and has since paid $10. The court, while the trial was in progress, permitted Lavoie, who is a minor, to rescind the contract he made with Wooldridge and to return the car to Wooldridge. The value of the car at that time was $50. The depreciation in the value of the car was due in part to natural causes and in part to Lavoie's improper use of it. Transferred on Wooldridge's exception to the verdicts and to the court's permitting Lavoie to rescind the contract.

YOUNG, J. Since Lavoie was a minor, he could rescind the concontract he made with Wooldridge at any time before he became 21, or

within a reasonable time thereafter, for any reason, or for no reason, and recover back the money he had paid toward the purchase price, by returning the car and accounting for (1) any benefit he had received from its use, and (2) paying any damage to the car that was caused by his tortious acts. Hall v. Butterfield, 59 N. H. 354, 358, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408; Young v. Currier, 63 N. H. 419.

While it is true, as Wooldridge contends, that the pleasure to be derived from the use of a car may be a benefit to a minor within the meaning of this rule, whether Lavoie was benefited by using this car in the way he did depends on whether using it in that way was the reasonable thing for a boy in his station in life to do; and as the facts are understood the court has found that using the car in the way Lavoie did was not the reasonable thing for him to do.

Although Lavoie should account for any damages to the car that were caused by his tortious acts, he cannot be compelled to account for damages that were caused by his ignorance or unskillfulness in operating the car (Stack v. Cavanaugh, 67 N. H. 149, 153, 30 A. 350); and while the court has found that a part of the depreciation in the value of the car was due to Lavoie's "improper use of it," it has not found that he either willfully or negligently damaged the car, and one of these things must appear before he can be compelled to account for any part of the depreciation, for the test to determine that question is the same that would be applied to determine the plaintiff's right to recover, if Lavoie had hired the car and this was a suit to recover damages caused by the way Lavoie used it.

There is no merit in Wooldridge's contention that the court erred in permitting Lavoie to rescind the contract during the trial. No reason has been suggested, and none is apparent, for holding that the court cannot permit a minor to rescind his contract at any time before judgment, if it finds that that is the reasonable thing to do. Neither is there any merit in his contention that he is prejudiced by the fact the car is under attachment in both of these suits, for ordering judgment on the verdict in the first suit in and of itself discharges the attachment in that suit, and paying the judgment in the second suit will have that effect in so far as the attachment in that suit is concerned.

Exceptions overruled. All concurred.[38]

[38] Cf. the discussion, in Whitman v. Allen, 123 Me. 1, 121 A. 160, 36 A. L. R. 776 (1923), supra, p. 250, of the New Hampshire and Minnesota doctrine of "benefits." See, contra, White v. Sikes, 129 Ga. 508, 59 S. E. 228, 121 Am. St. Rep. 228 (1907); Nielson v. International Text-Book Co., 106 Me. 104, 75 A. 330, 20 Ann. Cas. 591 (1909). Cf. the definition of benefits in Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688 (1907), supra, p. 223.

In Downey v. Northern Pacific Ry. Co., 72 Mont. 166, 232 P. 531 (1924), it was held that legal services need not be paid for, under a statute which required the return of the consideration as a condition of disaffirmance.

In Johnson v. Northwestern Mutual Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473 (1894), the court held that,

SECTION 3.—EFFECT OF DISAFFIRMANCE UPON TITLES

BADGER v. PHINNEY.

Supreme Judicial Court of Massachusetts, 1819. 15 Mass. 359, 8 Am. Dec. 105.

This was an action of replevin, in which the plaintiff declares upon a taking by the defendant on the 20th of August, 1818, and on a detainer at the time of suing out the writ, which is tested and was executed on that day.

The defendant pleaded property in himself as administrator of the estate of Rufus Rand, with a protestando that he did not take, and also non cepit, with a protestando that the property is in him as administrator; and it was agreed that, if it was competent for the defendant thus to plead, issue should be joined by the plaintiff upon the said pleas. * * *

PUTNAM, J., delivered the opinion of the Court. Several objections have been made to the plaintiff's recovery. * * *

We proceed to consider the second contract, made in the fall of 1817, when the plaintiff, induced by the misrepresentation of Rand that he was of age, conveyed the goods to him. The defendant contends that he has rescinded that contract, as administrator of Rand. When then? Should not the plaintiff and defendant be placed in the same situation as if no such contract had been made? But that will not do for the defendant. His notion of rescinding is to keep all, and to pay nothing on the contract. He has defended successfully against the plaintiff's suit for the price of the goods, on the ground that his intestate was an infant; and he now contends that he may hold the goods also, without making any payment for them, for the same reason.

This result does not follow. The goods were delivered by the plaintiff to Rand, because he undertook to pay for them, and declared that he was of age. The basis of this contract has failed, from the fault, if not the fraud, of the infant; and, on that ground, the property may be considered as never having passed from, or as having revested in, the plaintiff. * * *

It has been further objected, that the writ was delivered to the officer before a demand was made for the goods. It is a sufficient answer that, if the defendant had delivered the goods upon the demand, there would have been no necessity to serve the writ. It may be considered as purchased at any moment of the day of its date which will most accord with the truth and justice of the case. And it is evident, that it

where an infant has had the benefit of "life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate or his financial ability to carry it," he cannot recover the premiums paid, so far as they were intended to cover the current annual risk assumed by the company under its policy.

was not to be considered as of any validity until after the demand and refusal to deliver the goods was had.

Judgment for the plaintiff.[39]

FITTS v. HALL.

Superior Court of Judicature of New Hampshire, 1838. 9 N. H. 441.

[The plaintiff was induced to sell hats to the defendant, relying upon the latter's false and fraudulent representations that he was of full age. The defendant gave to the plaintiff his note for the price. The plaintiff sued on the note and the defendant pleaded infancy and recovered judgment and costs.

This action was then brought. There were two counts, one in case for deceit and the other in trover.

The court instructed the jury, that if they were satisfied, from the plaintiff's evidence, of the truth of the facts set forth in the declaration, they might for the purpose of this trial consider the action sustainable in point of law.

Verdict for the plaintiff. Motion that verdict be set aside and non-suit entered.]

PARKER, C. J. The general principle applicable to this case is, that an infant is liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65.

Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. 6 Cranch, 231, 3 L. Ed. 207, Vasse v. Smith; 3 Pick. (Mass.) 492, Homer v. Thwing. And in detinue, where he received skins to finish, and afterwards withheld them. 4 Bos. & Pul. 140, Mills v. Graham. And assumpsit for money had and received, has been sustained against an infant for money embezzled. 1 Esp. Rep. 172, Bristow v. Eastman; Peake's Rep. 222, s. c.

But a matter of contract, or arising ex contractu and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; held that infancy was a good plea in bar. 2 Marshall's Rep. 485, Green v. Greenbank; 4 E. C. L. Rep. 375, s. c. [Part of opinion omitted.]

The principle to be deduced from these authorities seems to be,

[39] Accord: Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101 (1844).
The vendor cannot, however, use the strategy of suing in replevin after the infant has used or disposed of the property and thereby secure a judgment against him for its value. Kay v. Haupt, 63 Pa. Super. Ct. 16 (1916).

that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.

Upon this principle the count in trover, in this case, cannot be supported, upon the evidence offered.[40] The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he can not redeliver them, neither his refusal to pay, nor a refusal to deliver the goods, can be considered as any thing more than a breach of contract. A refusal to pay is a breach of the express contract, and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract, in such a case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it.

Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract, upon which he received the goods, by his misrepresentations. The goods were, notwithstanding, received upon a contract; and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held, of itself, to be a conversion.

If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract, and upon such evidence the count in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon

40 Accord: Drude v. Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755 (1903

him. 15 Mass. 359, Badger v. Phinney. In this latter case, the defence of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the court said, "the basis of this contract has failed, from the fault, if not the fraud of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. Vasse v. Smith, 6 Cranch, 231, 3 L. Ed. 207; Mills v. Graham, 4 B. & Pul. 140, before cited.[41]

[The court then considered whether this action could be maintained against the defendant for the fraudulent representation that he was of age, and held that it could. This portion of the opinion is given post, p. 310.]

STRAIN v. WRIGHT.

Supreme Court of Georgia, 1849. 7 Ga. 568.

In equity. [The facts are sufficiently stated in the opinion of the court.]

BY THE COURT—WARNER, J., delivering the opinion.

Two grounds of error are alleged to the judgment of the Court below, in this case. First, in refusing to give to the Jury the instructions asked by the counsel for the complainant. Second, in giving to the Jury the instructions as set forth in the record before us.

It appears that the defendant had purchased from the complainant's intestate a negro, for which he paid a part of the purchase money, and executed his note for the balance. At the time this contract was executed, the defendant was an infant, who took the negro into his possession. When sued upon the note given for the balance of the purchase money for the negro, after attaining full age, he filed the plea of infancy to the action upon the note, and at the trial, sustained his plea by proof, whereupon the plaintiff in that action dismissed it.

The complainant then filed his bill, setting forth the facts of the

41 See Lamkin & Foster v. Le Doux, 101 Me. 581, 64 A. 1048, 8 L. R. A. (N. S.) 104 (1906), where the former infant, after majority, successfully pleaded infancy to a suit for the price of the goods, though he had sold some of them after majority; this result being caused by a statute which required ratification to be in writing. Then the vendor sued for the amount which was received from the sale of the goods, contending that by relation the plea of infancy revested the title in the vendor as of the time of the sale to the infant, and that the sale after majority was a sale of the vendor's goods. The court refused to follow this contention.

case, and prayed for a decree to have the negro sold, and out of the proceeds of such sale, to pay the defendant the amount paid by him to the complainant's intestate, and the balance thereof to be paid to the complainant.

The instructions asked by the complainant's counsel assert the proposition, that the contract for the sale of the negro was disaffirmed by the defendant, by his plea of infancy to the action on the note, and that the title to the negro revested in the original vendor, or his legal representative, and that it was competent for a Court of Equity to decree a sale of the negro, so as to adjust the equitable interests of the respective parties to the contract, according to the facts of this particular case. The instructions requested were, in our judgment, correct in point of law, and ought to have been given.

1. The contracts of infants are not void, but voidable at their election, when they arrive at twenty-one years of age. 2 Kent's Com. 235; Roof v. Stafford, 7 Cow. (N. Y.) 179. By his plea of infancy to the action brought upon the note given in part payment for the negro, the defendant disaffirmed the contract for the sale of him.

2. An obligation or other deed of an infant, shall be avoided by plea of within age. 3 Comyn's Dig. 550, letter c, 5. The plea of infancy was his own voluntary act, and manifested his intention to repudiate the contract, and he is therefore bound by it. The defendant will not be permitted to disaffirm the contract, when sued for the purchase money by the vendor, and when the latter seeks to recover the property, in consequence of such disaffirmance, to refuse to give it up, and then insist upon such refusal as evidence of an affirmance of the contract, as was contended by the counsel for the defendant in error. When the defendant filed his plea of infancy to the contract, he made his election to disaffirm it, and he is bound by such election.

It has been insisted on the argument, that when an infant has received property by virtue of an executed contract made with an adult, that when he arrives of age and disaffirms the contract, by his plea of infancy to the note given for the property so received, the adult cannot recover from the infant, either the purchase money for the property sold to him, or the property. Upon what legal principle this doctrine can be supported, we are unable to determine; certainly upon no just principle.

3. The infant, in this case, derived his title to the negro by virtue of the contract made with the complainant's intestate. When of age he disaffirms the contract, and it is cancelled for his benefit. The contract of sale being rescinded at the instance of the infant, what becomes of his title to the property derived from the vendor? According to legal rules and common sense, it would seem that the title to the property would revest in the vendor; and yet the authorities to be found in the books upon this question are not as harmonious as might be expected. We, however, adopt the rule as stated by Chancellor Kent. If the infant avoids an executed contract, when he comes of

age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side, without returning the equivalent on the other. 2 Kent's Com. 240. The cases of Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, Roberts v. Wiggin, 1 N. H. R. 73, 8 Am. Dec. 38, and Roof v. Stafford, 7 Cow. (N. Y.) 179, are cited in support of this doctrine. In Badger v. Phinney, the court inquire, after the contract has been rescinded, what is to be done then? "Should not the plaintiff and defendant be placed in the same situation as if no such contract had been made? But that will not do for the defendant. His notion of rescinding is to keep all and to pay nothing on the contract." So here, the defendant wishes to keep the negro, and not pay the note given for the purchase money. The rule adopted in Badger v. Phinney, is recognized by the Supreme Court of Alabama, in Jefford's Adm'r v. Ringgold & Co., 6 Ala. 548. See, also, Boyden v. Boyden, 9 Metc. (Mass.) 519. We cannot sanction the doctrine contended for, that an infant who obtains property by virtue of a contract with an adult, may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant, would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights. There is no doubt, in the view we have taken of this case, that if no part of the purchase money for the negro had been paid to the vendor, and the note had been given for the entire amount thereof, that upon the disaffirmance of the contract by the defendant, an action of trover might have been maintained at Law by the vendor, for the recovery of the property; but part of the purchase money having been paid to the vendor by the defendant for the property, the remedy of the vendor, at Law, was inadequate and difficult. The peculiar facts of the case raised such an equity in favor of the complainant, as gave to the Court of Equity jurisdiction, for the purpose of settling the rights of the respective parties. The charge of the Court to the Jury was a denial of the complainant's right to the relief which he prayed—to have the negro sold, and out of the proceeds thereof, to pay the defendant the amount paid by him, and the balance to be paid to the vendor. The contract having been disaffirmed by the defendant, such a decree, in our judgment, would have properly adjusted the rights of the respective parties, according to the facts as made by the record before us, and ought to have been so adjudged.

Let the judgment of the Court below be reversed, on the ground that the Court erred in not giving the instructions as requested by the complainant's counsel, and in giving the instructions as set forth in the record.[42]

[42] **Accord: Wyatt v. Lortscher, 217 App. Div. 224, 216 N. Y. S. 571 (1926).**

TOWER-DOYLE COMMISSION CO. v. SMITH.

Kansas City Court of Appeals, Missouri, 1900. 86 Mo. App. 490.

ELLISON, J. This is an action of replevin for a lot of steers which were of proper age and condition for fattening. The plaintiff recovered judgment in the trial court.

It appears that plaintiff sold the cattle to defendant for $850, the latter executed his note due in four months to plaintiff together with a chattel mortgage on the cattle to secure the same. Defendant was an infant at the time for his purchase and the date of the note and mortgage. Plaintiff delivered the cattle to him and he fed them a lot of corn of the value of $450. His services in feeding and attending the cattle were of the value of $50. Defendant became of age shortly before the note became due; he then notified plaintiff that he rescinded the contract on account of infancy and offered to return the cattle to plaintiff upon payment to him of the value of the feed and services aforesaid, for which he claimed a lien. Plaintiff in turn offered to give up the note and mortgage and receive the cattle, but refused to pay for the feed and services.

The question for decision is, whether, under the foregoing facts, defendant is entitled to a lien?

The law grants the privilege to an infant, on becoming of age, to disaffirm a contract made by him while a minor. But to do so, he must return the consideration received, if he yet has it, or the fruits of it. If he has squandered it, or otherwise made way with it and can not return it, he may nevertheless repudiate the contract and the adult who contracted with him must suffer the loss. Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194. So he may avoid his special contract for personal services and recover on a quantum meruit. Lowe v. Sinklear, 27 Mo. 308; Thompson v. Marshall, 50 Mo. App. 145; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Whitmash v. Hall, 3 Denio (N. Y.) 375; Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Medbury v. Watrous, 7 Hill (N. Y.) 110; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194.

We are of the opinion that the principle of the foregoing statements of the law is applicable to the facts of this case. It was plaintiff's fault to put the cattle with defendant, who was incapable of contracting. Plaintiff can not now be allowed to receive the benefit accruing without paying for it. In theory of the law the infant can repudiate the contract for the reason that he has had put upon him an improvident bargain. The adult should not be the gainer by this. The contract of an infant, when repudiated by him, leaves the parties without a contract and the infant, therefore, has such rights as would exist had there been no contract. In this case, plaintiff, in effect,

turned over the possession of the cattle to defendant without a contract of sale and mortgage for the purchase money and defendant had fed and cared for them for plaintiff's benefit. He is, therefore, entitled to a lien for this under the general statute (section 4228, Rev. St. 1899 [page 2319, Ann. St. 1906]), providing for liens where animals are boarded and cared for.

The judgment will be reversed and cause remanded. All concur.[43]

WEAVER v. JONES.

Supreme Court of Alabama, 1854. 24 Ala. 420.

CHILTON, C. J. Jones sued Weaver in assumpsit, for the use and occupation of a lot in Selma. It appears from a bill of exceptions, which was sealed upon the trial, that the plaintiff, Jones, while an infant, had sold the lot, and executed his bond for title in the usual form; after he arrived at age, he disaffirmed the contract, paid Weaver back the purchase money, with the interest, and received back his bond. Weaver, in the mean time, had made valuable and permanent improvements on the lot, in the erection of a livery stable. This suit is brought by Jones, to recover rent for the time Weaver occupied the lot; and Weaver insists, that he should be allowed to recoup the value of his improvements, which gave to the lot its principal yearly value; the rent, aside from such improvements, being quite inconsiderable.

The court, among other things, charged the jury, that, if the plaintiff (Jones) was a minor at the time of selling the lot, and they should find that such sale was not an advantageous one to the plaintiff, then the contract would be void, and the damages could not be recouped.

The counsel for the defendant in error endeavors to maintain the correctness of this charge, upon the alleged ground, that a bond with a penalty, given by an infant, is absolutely void, and that being void, the defendant below must be regarded in the light of a mere trespasser, and as such not entitled to recoup for improvements.

If this position be correct, we think it is very clear the plaintiff, Jones, has no standing in court; for the action of assumpsit will not lie, in the absence of a contract either expressed or implied; and no contract for the payment of rent is implied, by law, as against a mere naked trespasser. The owner, in such case, must resort to his action of trespass, to recover damages for the tortious entry and holding of the premises. True, there are cases, where the owner of a term may elect to treat one who trespasses on him as his tenant, after the term

[43] Accord: Nations v. Gregg (C. C. A.) 290 F. 157 (1923).

expires; for, otherwise, he would be remediless. Such was the case of Catterlin v. Spinks, in 16 Ala. 467. So, also, in cases of permissive holding, as where the party in possession holds under a verbal contract of purchase, which he repudiates. The case of Davidson v. Earnest, in 7 Ala. 817, furnishes an illustration of this latter class. See also Rochester v. Pierce, 1 Camp. 466, and Hull v. Vaughn, 6 Price Exchq. Rep. 157. If, however, the bond in this case be absolutely void—a mere nullity—and the party a mere trespasser, the case falls under neither of the qualifications above stated. There would be no demise, express or implied, and no permissive holding. To entitle the plaintiff below to a recovery, it is, therefore, necessary to affirm the validity of the bond for some purpose, as amounting at least to a permission to the plaintiff in error to occupy.

But is a bond for title, given by an infant, an absolute nullity? The old cases, and several elementary writers who follow them, maintain the affirmative of the proposition; but we think it clear, both upon principle and the current of modern cases, that it is not.

The object of the rule which enables an infant to repudiate his contracts, when he arrives at full age, is to furnish him a shield or protection against the improvident bargains he may enter into, resulting from presumed incapacity, by reason of his youth, to contract. It may often happen, that his contract may prove a very beneficial one to him, and he may desire, when of age, to affirm it, which he could not do, if it were void.

The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority. Parsons on Contracts, 224 and notes; 1 Amer. Leading Cases, 103, 104. The rule, as recognized by the charge, that the court, or (as in this case) the jury, must determine whether the contract was beneficial or prejudicial to the infant, and hold the contract voidable or void according to the result of such finding, has been rejected by many of the courts in modern times, as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely, the benefit of the infant. It is certainly more conducive to his benefit, to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine this question for him. Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Parsons on Con., note e to page 244.

We must consider Weaver as holding possession of the lot under a contract for its purchase, which was voidable, and as holding by permission of Jones, the plaintiff, who may, therefore, treat him as his tenant, and maintain this action of indebitatus assumpsit for use and occupation.

The question then arises, What damage has Jones sustained by the failure of Weaver to comply with the implied assumpsit to pay reasonable compensation for the use of the premises?

In this equitable action of indebitatus assumpsit, can the plaintiff recover for the use and enjoyment of permanent and valuable improvements, which the defendant himself has erected, without allowing a discount or abatement of his recovery by way of compensation for such improvements? If they were erected in good faith, under a contract of purchase, which, though voidable, was not void, we feel satisfied that, when the infant disaffirms the contract, the law will not raise in his favor an assumpsit on the part of the defendant to pay for the use of the permanent improvements made upon the faith of the contract, without considering the improvements, and abating the recovery to the extent of their permanent value. It is thus that the courts give effect to the general rule, that in actions arising upon contracts, the plaintiff recovers the actual damage sustained. Sedgwick on Damages, pp. 430 to 446; 2 Greenl. Ev. 208. And if such be the rule in regard to express contract, much more would the court look to circumstances growing out of, and connected with an implied undertaking. See upon recoupment, Hatchett v. Gibson, 13 Ala. 594; Costigan v. Mohawk & H. R. R. Co., 2 Denio (N. Y.) 616, 43 Am. Dec. 758.

It follows, therefore, that the court erred in respect of the claim for improvements by way of recoupment.

We deem it unnecessary to examine the other questions raised upon the admission of evidence, since it is probable that they may not arise upon a subsequent trial.

Let the judgment be reversed, and the cause remanded.[44]

DOWNING v. STONE.

Kansas City Court of Appeals, Missouri, 1891. 47 Mo. App. 144.

GILL, J. William E. Downing, an infant, by his next friend, prosecutes this action against defendant for the conversion of a mare. The petition is in the usual form. Case was tried by the court. Plaintiff's evidence showed that on August 5, 1889, Wm. E. Downing was about 19½ years of age; that he was on that day the owner of the mare in question of value of $100, and traded her to one Hartshorn, and

[44] See, also, Burton v. Little, 9 Bush (Ky.) 307 (1873); Jones v. Cohen, 82 N. C. 75 (1880).

In Baisden v. Gibson, 208 Ky. 341, 270 S. W. 830, a purchaser was held entitled to a lien for taxes paid and the amount by which the land had been increased in value by improvements made by him, upon disaffirmance by an infant. However, in Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924), the court purports to treat as a converter ab initio a stockbroker who, at the infant's direction, sold the infant's stock to a third person.

received in exchange therefor, by proper conveyance, the assignment of a patent churn, vesting in Downing the exclusive right to the whole patent within certain territory described in the deed, $45 in cash, and some orders for churns; that about six weeks afterwards Hartshorn sold the mare to the defendant Stone; that on November 20, 1889, some time after this sale, Wm. E. Downing tendered Hartshorn $45, the order for churns, offered to reconvey to him the patent, and demanded the return of the mare from Hartshorn, who stated that he did not own her, could not return her if he desired, and refused to accept the tender. On the same day, but afterwards, Downing demanded the mare of defendant, who was then the owner of her, but made no offer to give or deliver to defendant what had been received from Hartshorn for the mare, stating to defendant that he had made the tender to Hartshorn on that day, and that he (Hartshorn) did not accept. There was no evidence tending to show that defendant knew at the time he purchased the mare that Hartshorn had obtained her of an infant. Defendant introduced no evidence. At the close of plaintiff's evidence, defendant asked a declaration of law in the nature of a demurrer to the evidence. The court refused the declaration, and rendered judgment against defendant for the value of the mare and interest in the sum of $105.50. Defendant filed his motion for a new trial, which being overruled, excepted and appealed to this court.

We take it as the settled law of this, if not indeed of every other, state that, where an infant seeks to avoid or rescind an executed contract of sale made by him, he must first restore all that he received on that account, if he has it. Kerr v. Bell, 44 Mo. 120, 125; Highley v. Barron, 49 Mo. 103; Baker v. Kennett, 54 Mo. 82; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Betts v. Carroll, 6 Mo. App. 518.

Hence it was then that the plaintiff, a minor vendor, when seeking to rescind the sale and take back the mare he had sold to Hartshorn, made the effort to restore the consideration he had received. If Hartshorn had still been in possession, and the owner of the mare at the time of the tender back of the purchase price, then plaintiff's right of action as against said Hartshorn would have been complete. But we have here a new and different feature. At the time of this tender back of the consideration, demand, and attempted rescission, Hartshorn had sold and delivered the mare to defendant Stone. The question presented here, and at issue between the parties, is whether, in order to rescind the contract of sale, as made between plaintiff Downing and Hartshorn, the tender back of the consideration should be made to Hartshorn or to Stone. We are of the opinion that the tender back and notice of rescission should be made to the party with whom the infant contracted, in this instance Hartshorn, and not to Stone, a stranger to the transaction. There was between the minor Downing and Hartshorn a contract, voidable it is true, but still an existing contract, and it is clear that a proposition to abrogate and declare nugatory such contract

should be made to the party making the same, and not to another and different person. A contract existing between A and B cannot be rescinded by anything said or done between A and C.

II. But to my mind there is here a more serious question than the one above alluded to. Upon the facts here stated, should plaintiff Downing be allowed any action against defendant Stone, whatever may be his right as against Hartshorn? From the evidence set out in the record, we are warranted in the assumption that Stone was a bona fide purchaser for value of the mare from Hartshorn; that he bought and paid for the mare without any notice of Downing's infancy, or for that matter without any notice that Downing ever owned the mare at all, and to become such purchaser several weeks before Downing made up his mind to rescind or attempt to take the mare back. Admitting now these facts, there is much plausibility in the contention that, while the plaintiff may hold Hartshorn for the conversion of the mare, yet he ought not to be permitted to recover the animal, or her value, from this defendant, if he in good faith and for value purchased the animal before the attempted rescission. On the other hand, it may be well claimed that the sale of the mare to Hartshorn became, at the election of the infant plaintiff, as no contract, a nullity, and that the title thereto, on such election, must all the time be considered as vested in said minor, just as though no sale had occurred, and that plaintiff may follow up and recover his property from whomsoever may have the possession thereof.

A satisfactory decision of this question is attended with much difficulty. An investigation of the authorities possesses us with very few adjudications directly on this question. After a careful search, we have indeed found but one case precisely in point. In Hill v. Anderson, 5 Smedes & M. (Miss.) 216, the exact question is passed on. There it appears that Anderson, a minor, sold and delivered some slaves to Exum, and Exum thereafter sold the same to Hill, who in good faith bought and paid for the slaves without notice of Anderson's minority. Upon a rescission, Anderson was allowed to recover the property from Hill, regardless of his (Hill's) entire good faith in the purchase.

Of the great number of decisions we have examined on this question, a case somewhat of kin to this is found in 26 N. H. (6 Fost.) 280, 59 Am. Dec. 345, entitled Carr v. Clough, and, although the exact question as here in issue was not up for determination, the court there held that, "by the rescission, each party is entitled to his respective property so far as they themselves are concerned." "It follows" also, says the opinion, "in the absence of fraud, where the contract is fully executed, that, until the same is rescinded, the adult has the right to the property which he has received, and has the right to make a bona fide sale of the same before rescission." Carr v. Clough, 26 N. H. (6 Fost.) 295. In this case the situation of a purchaser from the minor's vendee is evidently regarded the same as that of a bona fide purchaser of an article from a fraudulent vendee. In that class of cases the rule is well

settled that, where one is defrauded and deceived into making a sale and delivery of personal property to another, such contract of sale is, as in case of sale by an infant, not void but voidable at the election of the misused vendor; but the vendor can only reclaim his property as against the vendee or a purchaser from such vendee with notice of the fraud. He cannot recover it, or its value, from a bona fide purchaser of the vendee. The recourse of the defrauded vendor is only against such vendee or those purchasing the goods from him with notice.

Now, upon a painstaking consideration of these cases, with the principles back of them, we are constrained to follow that of Hill v. Anderson, supra, and to hold, that a contract of sale of goods by an infant is voidable during his minority, and, when he elects to avoid such contract and gives notice to his vendee of rescission, tendering back the consideration (if he has it), then the matter stands as though no sale had ever been made, and the infant may follow the property delivered to the vendee into whosoever's hands he may find it, and may recover the property in kind or maintain trover and conversion if the possession is denied him. It is a rule, general in its application, that, if the vendor has no title, neither will his vendee acquire any. There are, it is true, some exceptions to this rule. For example, that, as it appears, where a bona fide purchaser from the fraudulent vendee is permitted to assert an indefeasible title, though the seller had one defeasible. But this exception to the rule has for its basis the principle that, where one of two innocent parties must suffer, he who had put it into the power of one to do an injury to another should suffer rather than such other who was entirely free from blame. But in case of the minor he is regarded as the special charge of the law and of the courts. He is supposed incapable of the exercise of discretion of caring for and protecting his own interest. The law will do this for and in his behalf. As is well said by the counsel in the argument of Hill v. Anderson: "The privilege the infant has, by law, to avoid his contracts, is given for his protection; but what protection is afforded him, in reality, if his privilege is lost at the moment his property passes out of the possession of his vendee. Fraud might readily be practiced on the confiding and inexperienced infant by irresponsible and insolvent purchasers, and the next moment the privilege, which the law has given for his protection, might be lost to him in a transfer of the property."

We have been unable to find any Missouri case precisely covering this question. In the case of Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569, however, an infant was conceded the right to recover real estate conveyed during minority, even as against a bona fide purchaser from the infant's grantee. We see no reason in principle why a different rule should apply when the subject of contract is personal rather than real property. 1 Parsons on Contracts, section 322, where it is said, that this right of the infant "may be exercised against all equities of purchasers from the grantee."

It follows then that this judgment should be, and therefore is, affirmed. All concur.[45]

45 Accord: Brewster v. Weston, 235 Mass. 14, 126 N. E. 271 (1920), semble; Conn v. Boutwell, 101 Miss. 353, 58 So. 105 (1912); Harvey v. Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62 (1890); Brantley v. Wolf, 60 Miss. 420 (1882), land; Hill v. Anderson, 5 Smedes & M. (Miss.) 216 (1845); Jackson v. Beard, 162 N. C. 105, 78 S. E. 6 (1913).

Under the provisions of section 24 of the Uniform Sales Act, a bona fide purchaser of chattels from the infant's vendee is protected against disaffirmance by the infant. See Williston on Contracts, § 233; Williston on Sales, § 348; Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924). In Carpenter v. Grow, 247 Mass. 133, 141 N. E. 859 (1923), the infant was permitted to disaffirm and recover from his vendee the market value of the chattel, which the vendee had resold to a bona fide purchaser. The infant had returned to his vendee the chattel which he had received in exchange for his chattel.

Under the Uniform Negotiable Instruments Law, an infant owner of a negotiable instrument may disaffirm his indorsement of a negotiable instrument and recover it from his indorsee. Murray v. Thompson, 136 Tenn. 118, 188 S. W. 578, L. R. A. 1917B, 1172, 1174, note (1916). See Welch v. Welch, 103 Mass. 562 (1870), to the effect that, if the maker of an obligation running to an infant pays the infant's indorsee, he cannot be required to pay again to the infant. The obligation in that case was not negotiable.

In applying the statutes relating to the recording of conveyances of land, it has been held that, where an infant conveys to A, who records his conveyance, under such circumstances that, under the law of the state, he is estopped to disaffirm his conveyance, and after his majority conveys to B, who has no knowledge of the circumstances creating the estoppel, A prevails over B. Benetto v. Holden, 21 Grant. Ch. (Ontario) 222 (1874); Damron v. Commonwealth, 110 Ky. 268, 61 S. W. 459, 96 Am. St. Rep. 453 (1901). But in Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224 (1865), it was held that, where an infant conveys to A, who records, and after majority affirms his conveyance to A, but later conveys to B for value and without notice of the affirmance, B prevails over A. See 18 Am. St. Rep. 661.

MAD.D.R.

CHAPTER 3

VARIANCE FROM ORDINARY RULES CONCERNING INFANTS' CONTRACTS AND CONVEYANCES

COURSOLLE v. WEYERHAUSER.

Supreme Court of Minnesota, 1897. 69 Minn. 328, 72 N. W. 697.

See supra, p. 175, for a report of the case.[1]

MORSE v. ELY.

Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 438, 28 N. E. 577, 26 Am. St. Rep. 263.

Action by one Morse against one Ely, to recover wages due plaintiff. Judgment for plaintiff. Defendant excepts. Exceptions overruled.

BARKER, J. The plaintiff, when of the age of 20 years, and in the employment of the defendant, agreed with him that there should be applied towards the payment of his wages a sum of $10, the difference between the price of a cow and of a horse which he received in exchange from the defendant, and also further sums for the services of a stallion, and of a bull, and for a calf which he bought of the defendant, and for the pasturage of a horse. These items were credited by the minor in his account with his employer. The contracts from which they resulted were fairly made, the prices were reasonable, and all the contracts were in fact beneficial to the minor. The cow, and a colt resulting from the services of the stallion, have been sold by him at their full value for cash. Whether he is yet in the possession of the calf does not appear. He has elected to avoid his contracts with the defendant, and has brought this action to recover for his wages, without deduction for any of the items. The questions raised by the bill of exceptions is whether, under the circumstances, the defendant is entitled to be credited with their amount. None of the contracts were for necessaries. The plaintiff had therefore a right to avoid them at his election, and it was not necessary for him, in order so to do, to return the consideration received, or to put the other party in statu quo. Chandler v. Simmons, 97 Mass. 508, 514; Bartlett v. Drake, 100 Mass. 174, 177; Walsh v. Young, 110 Mass. 396, 399; Dube v. Beaudry, 150 Mass. 448, 23 N. E. 222; Boody v. McKenney, 23 Me. 517; Price v. Furman,

1. See, also, the notes to this case on p. 176, and compare Waples v. Hastings, 3 Har. (Del.) 403 (1842), supra, p. 174, and Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496 (1876), supra, p. 176.

27 Vt. 268. If the sums which the defendant seeks to apply in payment had been actually paid to him in money, the plaintiff, upon rescinding his contracts, could recover them back. McCarthy v. Henderson, 138 Mass. 310; Pyne v. Wood, 145 Mass. 558, 14 N. E. 775. The defendant cannot avail himself of and enforce, by way of an allegation of payment, contracts which he could not enforce by a direct suit. McCarthy v. Henderson, ubi supra. To allow him to do so would be to affirm and enforce against the minor contracts which, for his protection, the law allows him to rescind. Exceptions overruled.

WAUGH v. EMERSON.

Supreme Court of Alabama, 1885. 79 Ala. 295.

[Action by Walker Emerson, a minor, suing by his next friend, against Emiline Waugh, to recover wages due for personal services rendered by him to her.

Plaintiff was without a father, the latter having died several years before. His mother had contracted a second marriage. The plaintiff was about nineteen years old and had no guardian. He was not shown to have had any estate. Commencing in the latter part of 1884 he agreed to serve Mrs. Waugh at an agreed price of $120 for the year, or $10 a month for a year. In October the plaintiff finally left Mrs. Waugh's service. He testified that he was discharged by her without cause. Mrs. Waugh testified that she had advanced to the plaintiff during the year from time to time money, tobacco, articles of clothing, etc., of which she kept an account. She produced this account and the items aggregated $75.60.

The defendant requested the following with other charges to the jury:

"(5) If the jury believe, from the evidence, that the plaintiff is a minor, eighteen or nineteen years of age, and that his father has been dead for several years; then it was his right and duty to work at some legitimate calling or labor, for his support and maintenance, and it was lawful and right for the defendant to hire him; and if she did hire him, and he performed work or labor for her, then it was lawful and right for her to pay him for such work; and if she did then, in good faith, pay him any sum or sums for his labor, then he can not recover in this suit the value of the services or labor thus paid for." The court refused this charge. The defendant excepted and now assigns the refusal as error.]

STONE, J. [after stating the case, continued:]

For the plaintiff—appellee here—it was contended in the court below, and the contention is renewed here, that the doctrine of an infant's liabilities for necessary articles furnished him, must be applied to Mrs. Waugh's asserted partial payments made; and that unless such payments and furnishings were in fact necessaries, suitable to

his estate and condition in life, then Mrs. Waugh is not entitled to a credit for them. We can not assent to this. The contract to serve was made by Emerson; and though a minor in years, he was in fact and in law emancipated. No one was bound to support him, and no one but himself could claim his wages. He had a clear right to direct and appoint their payment, and no other person could interpose and assert a paramount right to them. The present suit, brought while he was yet a minor, is itself an assertion of his right to collect them. His guardian ad litem would have no right to control the recovery. Will it be contended that the judgment he might recover could not be collected until a legal guardian is appointed to receive it? and if paid to him, or to his guardian ad litem, when the collection is coerced by execution, will the defendant be liable to another recovery, when a legally appointed guardian comes to claim it? Donegan v. Davis, 66 Ala. 362; Glass v. Glass, 76 Ala. 368; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Whiting v. Earle, 3 Pick. 201, 15 Am. Dec. 207; Johnson v. Silsbee, 49 N. H. 543; Isaacs v. Boyd, 5 Port. 388; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; Engelhardt v. Yung, 76 Ala. 534.

Situated as the defendant was, with no one but himself entitled to his earnings, he was entitled to receive compensation for his services, and equally entitled with an adult to receive partial payment while the work progressed. Payments to an infant should, probably, be scrutinized more narrowly, that frauds upon him, either in price or quality, be not sanctioned by the court. Beyond this, and with the exception of overreaching bargains, the right of an emancipated minor[2] to receive compensation for labor performed by him pursuant to his own contract, express or implied, rests on the same principle as that of an adult. The fifth charge asked and refused should have been given. We need not notice the other questions raised.

Reversed and remanded.[3]

[2] But the fact of emancipation or of the parents' consent does not give additional validity to an infant's transactions. Bombardier v. Goodrich, 94 Vt. 208, 110 A. 11, 9 A. L. R. 1028 (1920).

[3] Accord: Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152 (1879); Acme Lumber Co. v. Miller, 148 Va. 409, 139 S. E. 246 (1927).

In Wilhelm v. Hardman, 13 Md. 140 (1858), and Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654 (1832), where the infant agreed to work for board, education, etc., which he received, the court treated the contract as a contract for necessaries, which, if fair, the infant could not disaffirm and recover upon a quantum meruit.

In Pinnell v. St. Louis-San Francisco Ry. Co. (Mo. Sup.) 263 S. W. 182, 41 A. L. R. 1092 (1924) the court held an infant bound by a release executed by him when he accepted a railway pass which was given to him to enable him to go to seek a job.

See, for a case involving a gift of services by an infant, Ramsdell v. Coombs Aeroplane Co. Inc (Sup.) 161 N. Y. S. 360 (1916).

DEROCHER v. CONTINENTAL MILLS.

Supreme Judicial Court of Maine, 1870. 58 Me. 217, 4 Am. Rep. 286.

On exceptions.

Assumpsit upon an account annexed for 25½ days' work, at $1.25 =$31.87, ending June 29, 1869.

The case was referred to the presiding judge, with the right of alleging exceptions.

The judge found, as matter of fact:

That the defendants are a corporation and operators of a large cotton mill in Lewiston; that the plaintiff is a minor, and that she was emancipated by her father before the services for which this suit is brought were rendered; that when she commenced work for the defendants, she entered into a contract to work for them six months, at least, and give no less than two weeks' notice before leaving, failing in which she was to forfeit the wages due; that after working a portion of the time agreed upon, she left without giving any notice; that the loss resulting to the defendants, in consequence of the plaintiff's leaving without notice, exceeded the amount of her wages then due.

Upon these facts the presiding judge ordered judgment for the defendants; whereupon the plaintiff alleged exceptions.

WALTON, J. The question is, whether a minor, who has agreed to work for a manufacturing corporation at least six months, and not leave without giving two weeks' notice, but does leave without giving such notice, is liable to have the damages occasioned thereby deducted from the amount he would otherwise be entitled to recover for his labor.

We think not. To compel the minor thus to make good the loss occasioned by the non-performance of his contract, is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him. Stripped of all its sophistical surroundings, we think the doctrine contended for in defense amounts to simply this, that the minor's contract not to leave without giving two weeks' notice was obligatory, and having violated, it, he must pay the damage. Such a doctrine cannot be maintained.

The decisions on this branch of the law furnish us with a curious and instructive illustration of the mischief that is liable to be done

when judges undertake to generalize too much, and to decide more than is presented by the cases then before them.

In a case before the House of Lords on appeal, one of the questions was, whether an infant could, by contract, bar her dower. Lord Mansfield, in delivering his opinion, is reported to have said, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." Buckingham v. Drury, 2 Eden, 60.

Relying upon this dictum, it was afterwards held in England that money advanced by an infant for a lease of real estate, which he afterwards avoided, could not be recovered back. Holmes v. Blagg, 8 Taunt. 508.

Relying upon the same dictum, and the above decision, it was afterwards held in New York, that where an infant does work in part performance of a contract, which he fails to complete, he cannot recover for it. McCoy v. Huffman, 8 Cow. 84.

Similar decisions were made in Indiana and New Hampshire. Harney v. Owen, 4 Blackf. 337, 30 Am. Dec. 662; Weeks v. Leighton, 5 N. H. 343.

But these decisions, and the dictum of Lord Mansfield (so clearly erroneous, that one is almost led to doubt whether he could ever have made it), have all been overruled.

In England, the dictum of Lord Mansfield, and the use made of it in Holmes v. Blagg, 8 Taunt. 508, were repudiated in Corpe v. Overton, 10 Bing. 252. In the latter case, the court held that money paid by an infant toward the purchase of a share in the defendants' business, could be recovered back.

In New York, the decision in 8 Cow. was overruled in 7 Hill, 110 (Medbury v. Watrous). In the latter case, it was held that where an infant enters into a contract for the purchase of property, and performs work in part-payment of the price, but avoids the contract on arriving at full age, he may recover for the work.

In Indiana, the decision in 4 Blackf. 337, was overruled in Dallas v. Hollingsworth, 3 Ind. 537.

In New Hampshire, the decision in 5 N. H. 343, was overruled in Lufkin v. Mayall, 25 N. H. 82. In the latter case, it was held that an infant, who has avoided his contract for labor on the ground of infancy, may recover compensation for his services performed under it.

In Massachusetts, it was held that where an infant performs labor on a special contract, which he afterwards abandons, he may recover for his services, "as if no such contract had been made." This is undoubtedly the true rule of law. But in closing the opinion, the court inserted one of those unfortunate dicta, apparently unconscious that it was utterly inconsistent with the rule just laid down, namely, that the rule would do no injustice, "because the jury would give no more than under all the circumstances the services were worth, making any allowance for any disappointment amounting to an injury which the

defendant in such case would sustain by the avoiding of the contract." "It seems," therefore, says the reporter in his syllabus of the case, "that if the employer is injured by the sudden termination of the contract without notice, a deduction should be made on that account." The court just lay down the rule that the case is to be tried precisely as if no special contract had been made, and then add, in substance, that a deduction must be made for the breach of it. Moses v. Stevens, 2 Pick. (Mass.) 332.

In a later case in Massachusetts, the true rule is again stated, that by the avoidance of an infant's contract, it is annihilated ab initio, "and the parties are left to their legal rights and remedies just as if there had never been any contract at all;" and the absurd qualification annexed to it in the case just cited is, of course, omitted. Vent v. Osgood, 19 Pick. 572.

And in New York the qualification attempted (inadvertently we have no doubt) to be engrafted upon the rule applicable to such cases, was expressly overruled. The court said they could not yield their assent to the soundness of such a qualification; and the court held, that an infant plaintiff in such an action is entitled, by well-settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. Whitmarsh v. Hall, 3 Denio, 375.

The dictum of Lord Mansfield, in Buckingham v. Drury, 2 Eden, 60, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again;" and the remark in the opinion of the court in Moses v. Stevens, 2 Pick. (Mass.) 332, that "the jury would make an allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract," are undoubtedly the cause of most, if not all, of the confusion to be found in the books on this branch of the law.

We think the rule of law, applicable to this class of cases, is correctly stated in Vent v. Osgood, 19 Pick. (Mass.) 572; and in the opinion of this court in Robinson v. Weeks, 56 Me. 102; and is substantially this, that when an infant's contract is legally avoided, the rights of the parties are precisely the same as if it had never been made.

Having avoided her contract to work not less than six months, and not to leave without giving two weeks' notice, the plaintiff had a right to have her case tried and determined precisely as if no such contract had ever been made. Yet her case was not thus tried. The defendants were allowed, first, to show that such a contract was made, then the breach of it, then the loss resulting to them by reason of its breach. They then had the amount of such loss deducted from the wages due to the plaintiff; and the loss being greater than the wages, the plaintiff's suit was defeated, and judgment ordered for the defendants. Surely that was not having the rights of the parties tried and deter-

mined precisely as if no such contract had ever been made; for if no such contract had ever been made, certainly, no such result could have been reached.

Exceptions sustained.

New trial granted.[4]

APPLETON, C. J., and KENT, BARROWS, and DANFORTH, JJ., concurred. CUTTING, J., did not concur. TAPLEY, J., concurred in sustaining the exceptions.

VEHUE v. PINKHAM.

Supreme Judicial Court of Maine, 1871. 60 Me. 142.

The account annexed contained a credit by various articles furnished and supplied, amounting to $84.91, leaving a balance of $40.

There was evidence tending to show that the plaintiff, 19 years of age, first agreed to work for the defendant one month for $13, then a year from the expiration of one month, for $130; that the plaintiff worked about nine months in all and quit.

At the trial, the plaintiff, being still a minor, repudiated his contract, and claimed to recover on a quantum meruit the balance stated as the reasonable compensation for his services.

It appeared that, while the plaintiff was in the employment of the defendant, and during the latter's absence, the plaintiff, for his own gratification, harnessed the defendant's partially broken colt to the defendant's wagon; that the bit broke, the colt became unmanageable, and, running, threw the wagon against the barn and broke the wagon and harness.

The plaintiff claimed that colt was harnessed by the permission and with the consent of the defendant; but the defendant testified that the colt was harnessed without his knowledge and against his orders.

The presiding judge instructed the jury:

That the plaintiff, being a minor, had a right to repudiate his contract and recover what his services were reasonably worth, deducting therefrom what had been paid him by the defendant; and that, if they should find that the colt was harnessed by the consent of the defendant, the plaintiff would not be liable to have the damages done by the same deducted from his wages, but, if the colt was harnessed contrary to the defendant's orders, the jury might deduct the amount of the injury so done from the value of his services to the defendant.

The verdict was for the defendant, and the plaintiff alleged exceptions.

BARROWS, J. The jury were explicitly instructed that the minor was not bound by his contract, and was entitled to recover the value

[4] Accord: Widrig v. Taggart, 51 Mich. 103, 16 N. W. 251 (1883); Yancey v. Boyce, 28 N. D. 187, 148 N. W. 539, Ann. Cas. 1916E, 258, with note (1914), which see; Whitmarsh v. Hall, 3 Denio (N. Y.) 375 (1846).

of his services, deducting what he had received from the defendant; and "that, if the colt was harnessed with the consent of the defendant, the plaintiff would not be liable to have the damage deducted from his wages, but, if plaintiff harnessed the colt contrary to the defendant's orders, the jury might deduct the amount of the injury so done from the value of his services to the defendant."

The phraseology of this last instruction was faulty; but we do not perceive that the plaintiff could have been wronged thereby. It was what his services were reasonably worth under all the circumstances of the case that he was entitled to recover. If by his negligence or disobedience of orders he broke his employer's tools or damaged his property, his services were manifestly worth just so much less. The proper instruction would have been that the jury might consider such circumstances in estimating the value of his services.

Practically, however, the effect of the instruction given was precisely the same. The plaintiff was not injured by the failure of the presiding judge to use language that was technically correct.

Exceptions overruled.

FELLOWS v. WOOD.

Supreme Court of Judicature, Queen's Bench Division, 1888. 59 Law T. (N. S.) 513.

This was an appeal from the decision of the judge of the County Court of Greenwich.

The defendant, when an infant, contracted with the plaintiff, who was a dairyman, to enter his service on the following terms: The plaintiff was to pay the defendant a salary of £1. a week. The defendant was to serve the plaintiff, and was not to serve the plaintiff's customers for his own benefit during the time he remained in the plaintiff's employment or for two years afterwards. Two weeks' notice was to be given on either side in case of the termination of such employment. The defendant left the plaintiff's service without having given him two weeks' notice, and commenced serving the plaintiff's customers for his own benefit. The plaintiff proceeded against the defendant in the County Court, and claimed damages for breach of the agreement, and an injunction.

The County Court judge found that the defendant had entered into the contract, and that it was a beneficial contract for him, but held that, as it was not for necessaries, it was voidable, and therefore void under section 1 of the Infants' Relief Act 1874 (37 & 38 Vict. c. 62).

The plaintiff appealed.

Section 1 of the Infants' Relief Act 1874 provides as follows:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts

for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

MANISTY, J. This is an appeal from the decision of the County Court judge of Greenwich, refusing to grant an injunction to restrain the breach of an agreement by which the defendant agreed not to serve the plaintiff's customers for a period of two years after he had left the plaintiff's service. The whole matter depends upon whether the contract was, or was not, a beneficial one for the infant to enter into. The County Court judge found as facts, first, that the defendant signed the agreement, and secondly, that the agreement was for his benefit, but that it was not for necessaries, and was voidable, and therefore void under section 1 of the Infants' Relief Act 1874. I do not see how the County Court judge came to the conclusion that this case came within that section, or that it was voidable. I think that he was in error, and that it does not come within the Infants' Relief Act 1874. I consider that this contract was decidedly beneficial to the defendant; the notice the plaintiff was obliged to give was short, but the salary was reasonable, and the defendant had the opportunity of learning his business, and had plenty of time to get to know all the plaintiff's customers; so, for this reason, the plaintiff was justified in binding him not to serve them for two years after leaving him. I think that the County Court judge was wrong in the view he took of the law on the subject. In the case of Leslie v. Fitzpatrick, 37 L. T. Rep. (N. S.) 461, 3 Q. B. Div. 229, Lush, J., in his judgment, says: "Whether the provisions of the agreement are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labour contracts, or were, in the then condition of trade, such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself. If, on the other hand, advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound." This appears to me to be the correct principle, and there can be no doubt that an infant may enter into a contract which is beneficial to himself, and is bound by it. The injunction sought for must be granted.

STEPHEN, J. I am of the same opinion. I approve of the principle laid down in Leslie v. Fitzpatrick, and think that judgment must be entered for the plaintiff, and an injunction granted.

Appeal allowed.[5]

[5] Accord: Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. S. 458 (1906), where Laughlin, J., said: "It may be said that people should no

SCOT et ux. v. HAUGHTON et al.

Court of Chancery, 1706. 2 Vern. 560.

One Mr. Cornewallis, having set up a lottery called the *Wheel of Fortune* (1,680,000 penny tickets), or *a thousand pounds* for a *penny;* Mrs. Fuller, the wife of Dr. Fuller, sent for *twenty-four* of those tickets, and gave them amongst the servants, upon condition if 20s. or more should come up, her daughter should have a moiety of the lot; and one of them thus given to the defendant Haughton, her footboy, happened to produce the £1,000 lot (No. 992,231).

The £1,000 being paid to Dr. Fuller, Scot and his wife, daughter of Mrs. Fuller, brought their bill for a moiety of the £1,000 lot, and, it being undeniably proved by the rest of the servants and others, that the ticket, which cost but one penny, was given the footboy on that condition.

Per Cur. *Cujus est dare, ejus est disponere,* and an infant is to be bound by it as well as one of full age, and may be a trustee; and decreed it for the plaintiff accordingly.

Reg. Lib. 1705, B. fol. 261. Note, the tickets were purchased by Mrs. Fuller out of her own separate fortune. As to where an infant shall be bound, vide Jevon v. Bush, ante, 1 vol. p. 343, and cases cited in note there, Cary v. Bertie, ante, p. 343, and cases there cited. Fry v. Porter, 1 Mod. 310, 311.

employ infants where a knowledge may be acquired which may be used disadvantageously to the employer. No man would engage the services of an infant if he could not impose the same condition for his own protection against the use of his formulas, trade secrets, and lists of customers that he could exact of an adult. There appears to be no good reason why infants should be excluded from this class of employment, which would necessarily result if the courts were to hold that the employer has no remedy against a violation of such conditions as those embraced in this contract."

In Aborn v. Janis, 62 Misc. Rep. 95, 113 N. Y. S. 309 (1907), affirmed without opinion, 122 App. Div. 893, 106 N. Y. S. 1115 (1907), the enforcement of a negative covenant in a contract made by an infant actress was denied. Accord: Cain v. Garner, 169 Ky. 633, 185 S. W. 122, L. R. A. 1916E, 682, Ann. Cas. 1918B, 824 (1916). Cf. Carmen v. Fox Film Corporation (C. C. A.) 269 F. 928, 15 A. L. R. 1209 (1920), supra, p. 241.

Where an infant misrepresents his age, in order to secure employment in violation of a rule of his employer or of a Child Labor Statute, he is entitled to the duty of care ordinarily owed to employees, and may recover for an injury in spite of his fraud, unless his immaturity contributed immediately to the injury. Lupher v. Atchison, T. & S. F. Ry. Co., 81 Kan. 585, 106 P. 284, 25 L. R. A. (N. S.) 707 (1910). See authorities cited in notes in 30 Harv. L. Rev. 528, 10 Col. L. Rev. 366, and 8 Mich. L. Rev. 511.

Whether Workmen's Compensation Statutes apply to infant employees, and thereby limit their claims for injuries to the amount fixed by the statute, depends, of course, upon the language and interpretation of the various statutes. See, e. g., Young v. Sterling Leather Works, 91 N. J. Law, 289, 102 A. 395 (1917).

HLAWATY v. ZEOCK et al.

Supreme Court of Pennsylvania, 1916. 253 Pa. 311, 98 A. 557.

Action of ejectment by John Hlawaty against Andrew Zeock and others. From a judgment for defendants, plaintiff appeals. Affirmed.

MOSCHZISKER, J. John Hlawaty sued in ejectment to recover the possession of a piece of real estate which he had conveyed to the father of the defendants, who died and left the property to them. The plaintiff alleged and the jury found, that he was but 19 years of age at the time of the deed in question; but they further found that the conveyance was made in the execution of a trust, and, on that theory, they rendered a verdict in favor of the defendants, upon which the court below entered judgment. The plaintiff has appealed.

On examination the evidence shows that the following material facts could be found therefrom: March 24, 1911, Michael Hlawaty, who was then financially embarrassed, conveyed the land in dispute to his son, the plaintiff, on the mutual understanding and agreement that the latter should use the property for the prime purpose of liquidating the former's debts. In order to accomplish this, John Hlawaty executed a mortgage of $1,364.82 to John Zeock, father of the defendants, who was one of several interested creditors. The amount of this mortgage approximated the value of the property, and was enough to pay all the debts. It is not plain whether the mortgage was executed simply as additional security to Michael Hlawaty's creditors, or for the purpose of raising funds to pay his debts, but, however that may be, no money was paid thereon by the mortgagee to any one, and John Hlawaty, stating that he did not want to be "bothered" with the matter, on April 5, 1911, conveyed the property to John Zeock, with the intention that the latter should take his place and pay the debts of Michael Hlawaty. Zeock accepted the conveyance, and the evidence shows that the greater part of the debts was met by him, but it is not clear whether all of them had been paid at the time of trial. The original conveyance to the plaintiff was made with the knowledge and consent of the interested creditors. The deed to Zeock was executed and delivered with the knowledge and consent of Michael Hlawaty. After Zeock took possession of the property, he erected thereon an additional dwelling at an expense of at least $1,000. Both John Hlawaty and his father lived near the premises in question, and, no doubt, observed the improvement as it was being made. After the real estate was thus increased in value, the present action was brought. None of the above-recited instruments made any mention of the debts of Michael Hlawaty. The trial judge, however, submitted the case to the jury with instructions that, even though the plaintiff was a minor at the time, if they found the conveyance had been made to him "for the purpose of paying his father's indebtedness," and not as an absolute owner who had merely assumed the payment of such debts, then the transaction had the ef-

fect of creating a trust relation, and John Hlawaty took the property as trustee. Finally, the jury expressly stated in their verdict that they found in favor of the defendants because the property had been conveyed to the plaintiff on "a trust."

It is well established that: "One who takes and holds the legal title to land in trust can convey or mortgage the same in execution of that trust, and cannot disaffirm or avoid his deed or mortgage on the ground of his minority." 22 Cyc. 531.

When John Hlawaty accepted the conveyance from his father, he undertook to carry out a confidence reposed in him in the nature of a trust, which he accomplished in his own way when he made the deed to John Zeock. Therefore, so far as the plaintiff is concerned, the trust, whatever it amounted to, has been fully executed; and, since the principles of equity are interwoven with our law, the court below was entirely right in not permitting him to recover the property for his individual benefit, even though none of the deeds made mention of the trust obligation and he was a minor at the time of their delivery.

The assignments of error are all overruled, and the judgment is affirmed.[6]

KELLY v. COOTE.

Court of Common Pleas, Ireland, 1856. 5 Ir. C. L. 469.

MONAHAN, C. J., delivered the judgment of the Court.

In this case, which comes before the Court upon a demurrer to the defendant's plea, the facts appear to be as follows: The plaintiff sues for rent reserved upon an indenture of lease, alleging that the original lessee died seised of the premises demised, and out of which the rent is sought to be recovered, which he held for lives; that the cestui que vie is still in being, and that the property has descended to the defendant as heir-at-law of the original lessee. To this the answer is, that the defendant, who appears here by guardian, is still an infant under the age of twenty-one years, and that he was so at the time of the descent of the property in question upon him; that he has never entered into possession of the estate, or done any act in relation thereto, and that he is consequently not responsible for any rent that accrued due since the demise of his ancestor. To this plea the plaintiff has demurred, and several cases have been cited in argument. We have looked into the authorities, and it is clear that, upon the demise of the ancestor, the property vested in some way or other in the infant heir. It appears, from the case of Holden v. Smallbrooke, Vaugh. 201, that where there is a demise of land to a man and his heirs,

[6] Accord: Zouch ex dem. Abbott and Hallett v. Parsons, 3 Burrows, 1794 (1765); Gillette v. Kramer Motor Car Co., 163 Ill. App. 93 (1911), constructive trust of the proceeds of an embezzlement; Hughes v. Hughes (Tex. Com. App.) 221 S. W. 970 (1920).

habendum pur autre vie, and the lessee dies during the lifetime of the cestui que vie, the heir will take the land as heir, not in fee-simple, but as a descendible freehold. In the present case there was a similar descent; for the estate did not come to him by purchase, and although it is not an estate in fee-simple, yet we are of opinion that the property vested in the heir as a descendible freehold, and therefore that the landlord is entitled to maintain his action. The legal estate became vested, to all intents and purposes, in the infant heir upon the death of the lessee, and therefore the question is as to his liability. Nothing is clearer than this, that where an infant becomes entitled to property, subject to a certain burden, the obligation to discharge that burden also vests in him. Several authorities have been cited to sustain this proposition; but the late Railway cases are particularly in point, the case in 4 Exch. especially. In that case the Court held that they could not infer from the fact that the party had pleaded by attorney that he had ceased to be an infant, and therefore that the defendant's pleas were bad, as it did not appear by them either that he had originally become a shareholder, or that he had avoided the contract; and therefore that it might be assumed upon the pleading that they came to him by operation of law, or in some other way. So far as personal contracts are concerned, there is no doubt but that they will be void, except they be for necessaries; but in the case that I have alluded to, the Court held that if the infant became owner of the shares by will or devolution of law, he became liable for calls. This principle appears even more clearly from the decision in The North-Eastern Railway Company v. McMichael, 5 Exch. 114. We are therefore of opinion that the estate in question was cast upon the infant by the mere operation of law, and that until he disclaimed, or got rid of his liability in some other way, he was liable for the rent; and for these reasons, we must allow the demurrer.

Demurrer allowed.

BLAKE v. CONCANNON.

Superior Courts in Ireland, 1870. 4 Ir. C. L. 323.

Civil Bill for rent. The facts of the case appear sufficiently from the judgment.

PIGOT, C. B. In this case I decided, in point of fact, at the hearing at the Assizes, that the Defendant, under a letting made to him of the lands in question, in May, 1866, possessed and enjoyed the lands until the 20th of April, 1867; that he was under the age of twenty-one years when the letting was made; and that he still continued an infant on the 20th of April, 1867; that he, on that day, left the possession of the lands; and that, in due time after he had attained his majority (which event occurred shortly after he had left the possession), he repudiated the contract of tenancy, and the tenancy under it; but that in the

interval, before he had repudiated, and while he continued in possession and enjoyment of the lands, a gale of the rent sued for became due on the 1st of November, 1866.

Upon these facts I reserved the point, whether, by the repudiation, the Defendant not only became exonerated from liability for the rent, which, if he was liable for it at all, became due on the 1st of May, 1867, but also for that which became due on the 1st of November, 1866, while he continued in possession and enjoyment of the lands.

[The Chief Baron then said that having considered the judgments of Baron Parke in the cases of North-Western Railway Company v. McMichael, and Birkenhead, Lancashire, & Cheshire Junction Railway Company v. Pilcher, 5 Exch. 114, and the case of Ketle v. Elliott, as abstracted in 1 Rolle's Abridgment, 731, he formed the opinion that the defendant, having repudiated the letting in due time after he had attained his majority, and before he was sued for the rent, was entitled on the ground of his infancy and of that repudiation, to defend the action brought by this Civil Bill, but that he had subsequently allowed a reargument of the case. He then continued as follows:]

The result of that argument, and of further consideration of the case, and of the reasoning addressed to me by Mr. Monahan, was, that my opinion was changed.

I think, on consideration, that I gave a force and effect to the language of Baron Parke in the judgment before referred to, and also to the passages cited from Rolle's Abridgment, 731, and from Bacon's Abridgment, Infancy and Age (I) 8, which do not properly belong to them.

In the passage in Rolle's Abridgment, 731, the case of Ketle v. Elliott, decided in the 11 Jac. I, is stated thus: "If a lease for years be made to an infant rendering rent, the rent is arrear, and after the infant comes of full age, and afterwards continues the occupation of the land, this will make him chargeable with the arrears incurred during his infancy. Pasch. 11 Jac. I. Between Ketle and Elliott adjudged."

It appeared to me that Rolle's understanding of the import and effect of that decision was, that the facts, that the infant attained his majority, and afterwards attained his age, and afterwards continued in occupation of the land, constituted the reason which should make him chargeable with the arrears that accrued during his infancy; that is to say, that, but for the continuance of the Defendant in possession after he became of age, he would not have been liable; and that the mere enjoyment of the lands, while the rent was accruing, and until after it had accrued, would not render the infant liable. I am satisfied, on examining the different reports of Ketle v. Elliott, not only that it was not decided there that the occupation and enjoyment of the infant, until after the rent became payable, would not render him liable; but that the Judges, in that case, were of opinion, that such an occupation and enjoyment during infancy would create such liability.

In each of the reports of that case, the question is stated to be, whether a lease made to an infant is void. According to the reports in Cro. Jac. 320, and in 2 Bulstrode, 69, it was held, that the lease is voidable at the election of the infant, and that he may make it void by refusing and waiving the land before the rent day comes, and that "then no action of debt will lie against him." And the same view appears to have been entertained according to the report in Brownlow, 120. There was, according to the reports in Cro. Jac. and in Brownlow, an additional fact—that the infant became of age before the rent became due; so that it may not have been necessary to determine that he would have been liable if he had then remained an infant. But the proposition which I have stated is laid down in clear terms in Cro. Jac. 320, and in Brownlow, 69.

In 4 Bac. Abridgment, 376, Infancy and Age (I) 8, there is the following passage, for which the case reported in the three reports that I have referred to, and also in Rolle's Abridgment, 731, is cited as an authority: "If an infant takes a lease for years of land, rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and, by consequence, makes him chargeable with all the arrears incurred during his minority; for, though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance in possession after his full age ratifies and affirms the contract ab initio, and so gives remedy for the arrears of rent incurred from the time of the contract made."

In this passage it is distinctly laid down, that the repudiation of the contract of tenancy, after the lessee has attained his majority, will exonerate him from liability for the arrears of rent which accrued during his minority, and while he was in occupation of the land demised; and in the judgment of Baron Parke, in The North-Western Railway Company v. McMichael, 5 Exch. 125, that very learned Judge, dealing with an action for calls on railway shares vested in an infant, as analogous to an action for rent reserved upon a lease to an infant, appears to have adopted the view of the case so laid down in Bacon's Abridgment, which is referred to by Baron Parke in that judgment. Baron Parke says (page 125): "Under this Act, therefore," the General Railway Act, 8 & 9 Vict. c. 16, § 79, "our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any permanent interest; he is not deprived of the right which the law gives to every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. See Bac. Abridgment, Infancy and Age (I) 8."

It was upon that passage of Bacon's Abridgment, and upon that passage in Baron Parke's judgment, together with the terms in which

the case, cited as Ketle v. Elliott, is abstracted in Rolle's Abridgment, 731, that I was induced to form the opinion which I first expressed, as to the Defendant's exemption from liability to the arrears sued for in this Civil Bill, by reason of his repudiation of the contract and tenancy, before he was sued for those arrears. But, on consideration, I find nothing in any of the reports of the case cited in Bacon's Abridgment and Rolle's Abridgment (for they appear all to relate to one and the same decision), indicating any opinion or suggestion of the Court, that when the liability to the rent has once attached upon the infant by the demise to him, and by his occupation of the land until after the rent had accrued due, he not only can, by repudiating the demise, divest himself of the estate in the lands, and free himself from all future liability to the rent; but he can also divest the landlord of a right of suit which had become vested in him when the infant, without waiving or repudiating the tenancy, had continued in occupation until after the rent became due.

That an infant is liable to an action of debt for rent reserved on a lease for years made to him for land which he has occupied and used until after the rent became due, appears from very ancient authority. A case in the Year Book, 21 Hen. VI, 31, b, is referred to by Baron Parke in his judgments in the case in 5 Exchequer, and is also referred to twice in Ketley's Case, Brownlow, 120, in which the following is stated as law by Newton, Justice: "If one lease for a term of years, rendering rent, in fait" (that is, not by matter of record, see Co. Litt. 380) "to an infant within age, if he manures the land, a writ of debt is maintainable against him; the cause is, he has a quid pro quo."

Four cases were decided in the Court of Exchequer in England, in which actions were brought for calls on railway shares, and in each of which actions the Defendant relied upon his having been an infant when he became the holder of the shares. In each of these cases the Court considered the liability of the Defendant with reference to the law affecting infant lessees, and infant purchasers of land. The first was The Newry and Enniskillen Railway Company v. Coombe, 3 Exch. 565. There the Court treated the Defendant as having become the holder of shares only by reason of his having contracted with the Company, and subscribed for the shares; and having been an infant when he did so, and having disaffirmed and repudiated the contract and subscription before the action was brought, he was held exonerated from liability. The next case was The Leeds and Thirsk Railway Company v. Fearnly, 4 Exch. 26. There the Defendant pleaded that, at the time of his becoming and being the holder of the shares, and of the contracting of the debt in respect of the calls, the Defendant was an infant. The plea did not state either that he had become the owner of the shares by reason of a contract with the Company, or that he had repudiated the shares. On demurrer, the Court held him liable. The two next cases were those which I before mentioned: The North-Western Railway Company v. McMichael, and The Birken-

head, Lancashire, & Cheshire Railway Company v. Pilcher; both reported together in 5 Exchequer, 114. In each, the defence was, that the defendant became the holder of the shares while he was an infant. In neither did it appear that he became the holder only by contract with the Company, in neither was there any repudiation. And, although in one of the cases (The North-Western Railway Company v. McMichael), it was alleged in the plea, that the Defendant had derived no profits from the shares, it did not appear that the Defendant was still an infant. The Court, on demurrer to the plea in each case, held the Defendant liable, following their former decision in The Leeds & Thirsk Railway Company v. Fearnly, and a case previously decided in the Court of Queen's Bench—The Cork and Bandon Railway Company v. Cazenove, 11 Jur. 802, 10 Q. B. 935.

[Here the Chief Baron dealt at length with the judgment of Baron Parke in the case of North-Western Railway Company v. McMichael, and thereafter continued as follows:]

Long before those decisions the Court of Exchequer in Ireland (in the year 1829) made a similar decision in Billing v. Osbrey, in an action brought for rent upon a lease by the assignee of the reversion against an infant, sued as assignee of the lessee. The Defendant, by his guardian, pleaded, that at the time the rent became due he was, and at the time of the bringing of the action he still continued, an infant. On demurrer to this plea, the Court held that the infant was answerable for the rent during his enjoyment of the premises. The decision is to be found stated in 1 Furl. Landl. and Ten. 912. It is there stated from a manuscript note of the learned author, whose well-known care and accuracy may be fully relied on.

Two cases have been more recently decided in this country: Mahon v. O'Ferrall, 10 Ir. C. L. 527, and Kelly v. Coote, 5 Ir. C. L. 469, 2 Ir. Jur. N. S. 195. In each of these cases (as in that cited by Mr. Furlong), the Defendant was sued, as assignee of a lease, for rent reserved in it; and pleaded, as his defence, that he was an infant when the rent accrued. In each, the liability of the infant was affirmed. But there was not in any of them a repudiation of the estate or tenancy in respect of which the Defendant was sued, and which, upon the record, was treated as having vested in him.

Upon a review of all the authorities, and I am not aware of any others materially affecting the question arising on this Civil Bill, I am satisfied that I was wrong in forming the opinion, which I did reluctantly, that, upon the view which I at first took of the passages in Bacon's Abridgment and in Rolle's Abridgment of the case referred to, and of the judgments of Baron Parke, in 5 Exchequer, the Respondent, the Defendant in the Civil Bill, was discharged from liability to the first gale of rent.

It appears to me now, upon a consideration of the grounds on which an infant is held to be liable where, by the authorities to which I have referred, his liability is established, if he does not waive or re-

pudiate the tenancy and the land, that he ought to be held bound by that liability when it has been once attached to the payment of the rent which accrued while he has occupied, and before he has repudiated. He is not, in an action of debt for the rent, held liable upon the contract of tenancy alone. His liability arises from his occupation and enjoyment of the land, under the tenancy so created. If his liability arose from the contract alone, the repudiation of the contract, by annulling it, would annul its obligations, which would then exist only by reason of the contract. But the infant, though he can repudiate the contract of demise, and the tenancy under it, and can so revest the land in the landlord, cannot repudiate an occupation and enjoyment which are past, or restore to the landlord what he has lost by that occupation and enjoyment of the infant. The reason given by Justice Newton, in 21 Hen. VI, 31, b, lies at the root of the infant's liability: "He has had a quid pro quo." Though quaintly expressed, it is a reason sanctioned by common sense, and in accordance with plain justice. The infant owes the rent, because he has an equivalent in the occupation and enjoyment of the lands. The authorities to which I have referred appear to me sufficiently to indicate that, if the infant does not avoid the tenancy under which he occupies before the rent becomes due, the mere fact of infancy constitutes no defence. If, therefore, he continues so to occupy without repudiation, the landlord, on the accruing of the rent, has a vested right of suit against the infant for the rent which has so accrued. I cannot, on consideration, hold that such vested right can be divested by the mere repudiation of the infant, without a direct decision, or some unequivocal and acknowledged authority, sustained by general acquiescence or clear analogy of law. I have found none. The dictum of Baron Parke, in 5 Exchequer, 125, must be regarded with all the respect due to everything that fell from that eminent Judge. But it was not necessary for the decision of the case before him; and it was manifestly founded on the passage in Bac. Abr. Infancy and Age, (I) 8, or was influenced by that passage. And I have shown that the proposition in Bacon's Abridgment, which is there contained, and which appears to have been thus adopted by Baron Parke, was not warranted by the authorities cited in support of it.

On the whole, I am of opinion that the Respondent, the Defendant in the Civil Bill, was, and is, liable for the first gale of rent, but is not liable for the second; that the dismiss should be reversed, and that there should be a decree for the amount of the first gale. * * *[7]

[7] There seems to be practically no American authority upon this point. Cf. Peck v. Cain, 27 Tex. Civ. App. 38, 63 S. W. 178 (1901); Gannon v. Manning, 42 App. D. C. 206 (1914).

Housing may, of course, be a necessary, and there may be a liability for rent, or for use and occupation, on that basis. Marceiliac v. Stevens, 206 Ky. 383, 267 S. W. 229 (1924); Newberry v. Johnson (Tex. Civ. App.) 248 S. W. 456 (1923).

HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING CO.

Supreme Court of Judicature, Chancery Division, 1894. L. R. 3 Ch. 589.

Adjourned summons.

The Vaughan-Sherrin Electrical Engineering Company, Limited, was registered on the 16th of August, 1890, under the Companies Act of 1862. On the faith of a prospectus issued by the company the Plaintiff, Miss Hamilton, who was then of the age of eighteen, applied for shares, and paid £20, the amount payable on application. On the 6th of October, 1890, twenty ordinary shares of £5. each were allotted to her, and on the 18th of October she paid £40., being the amount payable on allotment. Her name was duly entered on the register as the holder of the shares.

On the 18th of November, 1890, she wrote a letter to the secretary of the company withdrawing her application and requiring payment of the £60. paid by her to the company, but received no answer. She attended no meeting of the company, nor did she receive any dividends on the shares. On the 19th of May, 1892, she, by her next friend, issued the writ in this action, claiming (1) a declaration that the allotment of the twenty shares standing in her name in the register of shareholders of the Defendant company was void; (2) that the register of the company might be rectified by striking out the name of the Plaintiff as a shareholder in respect of the said twenty shares; (3) that the Defendant company might be ordered to repay to the Plaintiff the sum of £60. paid by her to the company in respect of the shares, together with interest at 5 per cent.; and (4) that the Defendant company might be restrained by injunction from enforcing any call made, or to be made, on the Plaintiff in respect of the shares.

On the 10th of June, 1892, the company went into voluntary liquidation, and on the 27th of June the liquidator removed the Plaintiff's name from the register of shareholders.

The action now came on upon a summons in the winding-up, for the purpose of obtaining the decision of the Court upon the question whether the Plaintiff was entitled to the return of the £60. paid by her to the company.

STIRLING, J. [after stating the facts, continued]:

The case now comes on in order that I may decide whether or not the Plaintiff is entitled to a return of £60. paid by her to the company. This is claimed on the ground that there has been a total failure of consideration.

Three cases have been cited before me on this point. The first is Holmes v. Blogg, 8 Taunt. 508, 511. There the plaintiff brought an action to recover a sum paid by him during infancy to the defendant, who was lessor to the plaintiff and to one Taylor, with whom the

plaintiff was in partnership. The lease was granted to the plaintiff and Taylor, and £157. 10s. was paid by the plaintiff as a premium. Under the lease, Taylor and the plaintiff occupied the premises for three months. The infant afterwards avoided the lease, and then brought an action to recover the premium. Gibbs, C. J., in delivering the judgment of the Court, refers to an expression of opinion by Lord Mansfield in the House of Lords, where he says: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," and it was held that the infant was not entitled to recover. In Ex parte Taylor, 8 D. M. & G. 254, which was a case of a very similar nature, an infant had entered into an agreement for a partnership, and paid a premium on entering. He devoted much time to the business, and received an allowance weekly, amounting altogether to £172., but before he came of age he disaffirmed the contract. It was held that he could not prove for the premium in the bankruptcy of his late partner, on the ground that the contract had been part performed on each side, and the consideration had not wholly failed. The former of those two cases was considered in Corpe v. Overton, 10 Bing. 252. In that case the plaintiff, while an infant, signed a written agreement to enter into a partnership which was not to commence at once, but at a future date, and he paid down £100. as deposit. Between the date of the agreement and the date when the partnership was to commence the plaintiff came of age, revoked the agreement and rescinded the contract, and brought an action to recover the deposit. In opposition to his claim Holmes v. Blogg, 8 Taunt. 508, was relied upon, but the whole of the Judges composing the Court distinguished that case. Tindal, C. J., said (10 Bing. 255): "In Holmes v. Blogg, the infant had paid £157. as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the Chief Justice in delivering his judgment, yet when he comes to apply them to the subject before the Court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on: 'What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.' The ground, therefore, of the judgment in Holmes v. Blogg, 8 Taunt. 508, was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before." Then,

after discussing the facts in that case, he adds (10 Bing. 257): "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to Holmes v. Blogg is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and in the meanwhile the infant had derived no advantage whatever from the contract." And he held that the infant was entitled to recover. Gaselee, J., said: "I consider the present case as clearly distinguishable from Holmes v. Blogg." Bosanquet, J., said: "We are far from impeaching the judgment of the Court in Holmes v. Blogg, as applicable to the facts of that case. There, the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage. There is no reason, therefore, for finding fault with that decision. It is however, a general rule, that upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed." And Alderson, J., said (10 Bing. 259): "In this, the case is clearly distinguishable from Holmes v. Blogg. Here the infant has had no enjoyment of any advantage from the contract: In Holmes v. Blogg he had enjoyment, for a period, of premises demised to him; and so far was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment."

It is to be observed that all the learned Judges who dealt with the case distinguished it from Holmes v. Blogg, 8 Taunt. 508, on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract.

In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the Company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of Corpe v. Overton, 10 Bing. 252. The consideration has totally failed and the Plaintiff is entitled to recover, i. e., to prove for the amount in the winding-up.

STEINBERG v. SCALA (LEEDS) Limited.

Court of Appeal. L. R. [1923] 2 Ch. 452.

YOUNGER, L. J.[8] This plaintiff, while still an infant, applied on the prospectus of the defendant company for 500 shares of £1 each. Those shares were in due course allotted to her in response to her application, her name was placed on the register in respect of them, and she paid the installments fixed by the prospectus to the amount of 10s. on every share. In return, the infant respondent was placed in possession of something available for herself. But, being an infant, she has now, as she was entitled to do, repudiated her contract to take these shares, with the result that she is no longer liable to pay the installments which she has not paid, and the question which has to be determined on this appeal is whether, although she has received, and until she repudiated her contract was, like all the other shareholders in this company who took their shares as she did, in possession of something of her own, she is nevertheless entitled to recover back the £250 which she paid.

Now, during that period in respect of which this plaintiff had something available for herself, namely, the shares which were allotted to her and registered in her name, the company was thereby deprived of something of value to itself; it was precluded from allotting those shares to anybody else or from dealing with them in any way; it had disposed of them out and out to the plaintiff, and therefore it was prevented from utilizing for its own advantage the shares which stood in her name, so that during the period of time with which we are concerned the plaintiff was in possession of something and the company was pro tanto in exclusion. It is in these circumstances that we have to ask and answer the question whether this lady, who has now repudiated her contract, is entitled to have back any money she has paid under it.

Apart from the case before Stirling, J., the authorities appear to me to establish that, where something has been made available for the infant under the contract in the period during which she has not sought to avoid it moneys paid cannot be recovered back, although on the subsequent repudiation of the contract by the infant all liability in respect of further payments disappears, and I think the cases show that that which must be received by an infant under the contract sufficient to disentitle her to have moneys paid under it repaid need not be much; it must only be tangible; in other words, there must have been a total absence of consideration moving from the infant before the infant can succeed in getting back money which she has paid. I think that is shown in Corpe v. Overton, 10 Bing. 252, 258, and particularly in the judgment of Bosanquet, J., where, dealing with Holmes v. Blogg, 8

[8] Only the opinion of Younger, L. J., is given.

Taunt. 508, and distinguishing Corpe v. Overton, 10 Bing. 252, 258, from Holmes v. Blogg, 8 Taunt. 508, he says that, in Holmes v. Blogg, 8 Taunt. 508, "the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but, if they had been occupied for any other period"—that is to say for any other period however short—"there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage." Then he goes on to contrast the case before him: "Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed."

I think, therefore, we have here to ask ourselves the question whether, during the period when the plaintiff did not elect to repudiate her contract, the consideration for that contract, as between herself and the company, had wholly failed. To my mind it had not in any sense failed. There was some detriment to the company; and there was substantial consideration being enjoyed by herself, either actual or in possibility, during the whole of the period. She had the tangible advantage of being in a position to sell and transfer, if she had been so minded, her shares for a consideration which would, at least, have been substantial. She might, had she chosen, have attended meetings of the company. In these circumstances I think that the condition imposed upon an infant before she can recover money paid has not been complied with by the respondent. I agree with the Lord Justice in thinking that Stirling, J., in that respect did not correctly interpret the earlier authorities which he professes to follow in Hamilton v. Vaughan-Sherrin Electrical Engineering Co., [1894] 3 Ch. 589, when he said that the question was not (he did not put it in the negative form, but I do so) whether the consideration had wholly failed, but whether the infant had derived any real advantage. I think the question is not, Has the infant derived any real advantage? but the question is, Has the consideration wholly failed? In my judgment in this case the consideration has not wholly failed on either side, and accordingly the action, as my Lord has said, must be dismissed, and judgment entered for the defendants.

Appeal allowed.[9]

[9] See 157 Law T. 24, for a note on this case.

ELM CITY LUMBER CO. v. HAUPT.

Superior Court of Pennsylvania, 1912. 50 Pa. Super. Ct. 489.

Assumpsit upon a book account. Before Brumm, J.

From the record it appeared that the action was brought against David F. Haupt, Samuel C. Haupt, and Salinda Haupt, "doing business under the firm name of D. F. Haupt."

The defendants filed an affidavit denying the partnership, but there was nothing on the record to show that any notice of the affidavit had been given to the plaintiff or a copy of it served upon him.

The defendants presented this point:

1. That under all the evidence there can be no verdict in this case against David F. Haupt. Answer: Refused. [1]

Verdict and judgment for plaintiff for $746.34. Defendants appealed.

Opinion by PORTER, J., July 18, 1912:

The plaintiff brought this action against the defendants, as a partnership, "doing business under the firm name of D. F. Haupt." * * *

The defendant David F. Haupt was, at the trial, admitted to have been a minor at the time of the delivery of the goods in question to the defendant firm. This being the case, he, upon coming of age, notified the plaintiff that he disclaimed liability for this claim, because of his minority at the time the goods were delivered. There was no evidence in the case that he, upon attaining his majority, disaffirmed the partnership. There was submitted to the court below a point requesting an instruction that there could be no verdict against David F. Haupt, which point the court refused, and that refusal is the subject of the second specification of error. An infant cannot, as against his copartners, insist that, in taking the partnership accounts, he shall be credited with profits and not debited with losses, and, as against the creditors of the firm, he has no higher rights to the firm property than the adult partner; his only right is immunity from personal liability. Pollock on Contracts (4th Ed.) *p. 56; Bates on Partnership, 147; 22 Cyc. 586; Avery v. Fisher, 28 Hun (N. Y.) 508; Hill v. Bell, 111 Mo. 35, 19 S. W. 959. The plaintiff was entitled to a judgment which would bind the property of the firm and Samuel C. Haupt and Salinda Haupt, individually, but, as against David F. Haupt, it was entitled to a judgment limited to the property of the firm, and not binding him individually. The court below could not have affirmed the request of David F. Haupt for an instruction that there could be no verdict against him, for the plaintiff was entitled, as against him, to a judgment limited to the firm assets. The judgment must, however, be modified so as to limit its lien and that of any execution issued thereon to the property of the firm and that of Samuel C. Haupt and Salinda Haupt.

The judgment is modified by limiting the lien thereof and of any execution thereon issued to the individual property of Samuel C. Haupt and Salinda Haupt and the partnership property of David F. Haupt, Samuel C. Haupt, and Salinda Haupt, doing business under the firm name of D. F. Haupt, the said David F. Haupt being hereby released from individual liability under said judgment; and, as modified, the judgment is affirmed.[10]

MOLEY v. BRINE.

Supreme Judicial Court of Massachusetts, 1876. 120 Mass. 324.

Bill in equity to close up a partnership.

[Statement of facts omitted.]

The case was reported for the consideration of the full court; such order or decree to be entered as the case required.

GRAY, C. J. The assets remaining upon the settlement of the business of the partnership, being less than the amount contributed by all the partners to the common stock, must be divided among them according to the amount of their contributions, and the deficiency must be borne by the partners in the same proportions in which they were to bear profits and losses, that is to say, in this case, equally. Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311.

This rule is not affected by the fact that the defendant is an infant. According to the agreement between the parties, he contributed less than one-eighth of the capital stock, and was to receive one-third of the profits of the business. He actually entered into the partnership, had the benefit of it while it lasted, and drew out the greater part of his contribution. The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his copartners the obligation of making up the deficiency. Breed v. Judd, 1 Gray, 455; Holmes v. Blogg, 2 Moore, 552, s. c. 8 Taunt. 508; Ex parte Taylor, 8 De Gex, M. & G. 254; Aldrich v. Abrahams, Hill & D. Supp. 423, 425; Medbury v. Watrous, 7 Hill, 110, 112, 113; Heath v. Stevens, 48 N. H. 251.

Decree for the plaintiffs accordingly.[11]

10 See Gay v. Johnson, 32 N. H. 167 (1855), to the effect that, where the infant partner pleads infancy in some suits against the partners, but does not in others, that does not affect the character of the firm property nor its order of liability to the firm and individual creditors.

11 Accord: Adams v. Beall, 67 Md. 53, 8 A. 664, 1 Am. St. Rep. 379 (1887); Page v. Morse, 128 Mass. 99 (1880), actions at law by the infant partner against the adult partner. But see Kelly v. Halox, 256 Mass. 5, 152 N. E. 236 (1926).

THOMAS v. BANKS.

Supreme Court of Michigan, 1923. 224 Mich. 488, 195 N. W. 94.

Suit by Robert Thomas against Oliver H. Banks. Judgment for plaintiff, and defendant appeals. Affirmed.

BIRD, J. Plaintiff sued defendant to recover money which he had paid to him to purchase a half interest in his café in the city of Detroit. Plaintiff had a verdict at the hands of a jury in the sum of $1,745.

Plaintiff made proof on the trial that at defendant's solicitation he purchased a half interest in his café, on the representation that it was making money and would be a good investment for him. After assisting in operating the café about two months, plaintiff discovered it was a losing proposition. On the ground that he was a minor when he made the contract, he rescinded it when he became of age, and brought suit to recover the amount he had paid defendant.

1. Defendant requested the court to charge the jury that:

"The law is that, where an infant has paid money into a copartnership in consideration of being admitted into said copartnership, and has there remained for any length of time, he cannot recover the money so paid in said copartnership, unless he was induced to enter said copartnership by fraudulent representation."

This request was refused by the trial court. It appears to be supported by some of the cases. It is said in Cyc.:

"An infant may become a partner with an adult, but the partnership agreement is voidable at the election of the infant, although it is not void, and is binding upon the adult partner. Where an infant has paid money in consideration of being admitted as a partner in a business, and he has become a partner, and remains so for a certain time, he cannot recover back the money thus paid, unless he was induced to enter into the partnership by fraudulent representations." 22 Cyc. 585.

To this text is cited the case of Adams v. Beall, 67 Md. 53, 8 A. 664, 1 Am. St. Rep. 379, and it is fully supported by the holding in that case. The facts involved in the case cited are similar to those in the present case. This rule has not, however, been generally accepted by the state courts, although many have done so where the contract as a whole was a beneficial one to the minor.

In Dunton v. Brown, 31 Mich. 182, this court considered the question whether a minor could become a partner. It held that an infant's partnership agreement was not void but voidable. The question involved here, whether an executed contract during infancy is binding on the minor after he reaches his majority, was left undecided. The court, in closing the opinion, said:

"If the agreement was not void, then it precludes the right to repudiate it and substitute in its place a contract by implication entirely repugnant, and which no one ever contemplated. And it is also worthy of consideration whether, inasmuch as the partnership business continued

and ended before suit and before majority, it does not come within the rule which protects executed contracts in many cases. Squier v. Hydliff, 9 Mich. 274. Without deciding what may happen when the infant reaches majority, we think it impossible to sustain an implied assumpsit now, against the terms of the only agreement ever made, which was certainly not a nullity."

See Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

* * *

We are inclined to the rule followed in Sparman v. Keim, 83 N. Y. 245, on the ground that it is the better rule and more in keeping with the former holdings of this court with reference to infants' contracts. In the New York case plaintiff was a minor when he became a partner of defendant in a decorating business, on the representation that it was a paying business. Subsequently learning it was a losing business, plaintiff rescinded, and demanded the amount he had invested to become a partner. Suit was afterwards brought, and plaintiff recovered. In affirming the judgment the Court of Appeals said, in part:

"Almost all of the contracts of an infant are voidable and liable to be rescinded. This contract was of that character [citing cases]. The infant avoided it, as he had a right to do. The proof shows that he had received no benefit from it, except the sum of $112.69, which, on the trial, he said had been paid him out of the business, and which he offered to restore by deducting it from his claim, and asking judgment only for the balance with interest. He therefore both alleged and proved a good cause of action on contract."

The contract in the present case was not a beneficial one to the plaintiff. It appears to have been a losing business when he entered it. Under the rule in Sparman v. Keim, supra, plaintiff was entitled to recover what he had paid defendant, less what he had received from the copartnership fund. In this view the trial court was right in refusing to give defendant's request.

2. Plaintiff first began his suit in chancery. This suit was transferred to the law side of the court. This action was affirmed by this court on mandamus. Banks v. Wayne Circuit Judge, 221 Mich. 149, 190 N. W. 647. Before transferring the case, the partnership was dissolved, and defendant argues that the order dissolving the partnership is res adjudicata of the present case. The court, in making this order, did nothing more than plaintiff himself had already done. If he were an infant when the contract was made, he had a right to dissolve it when he reached his majority, just as he did do. No order was made in the chancery case which would in any way be a barrier to the proceedings in this case.

The judgment is affirmed.[12]

[12] See notes in 40 Harv. L. Rev. 472, and 33 Yale L. J. 558.

CUNNINGHAM, Trustee of Ponzi, v. BROWN.

Supreme Court of the United States, 1923. 265 U. S. 1, 44 S. Ct. 424, 68 L. Ed. 873.

Certiorari to review decrees of the Circuit Court of Appeals affirming decrees of the District Court which dismissed the bills in six suits, brought by the trustees of a bankrupt, under section 60b of the Bankruptcy Act [11 USCA § 96], to recover payments made by the bankrupt, upon the ground that they were unlawful preferences.

TAFT, Chief Justice. * * * "We do not see that a minor whose money could not be identified is in a better situation than that of the other defendants. Like them, on August 2d, he was only a creditor of Ponzi, and was moved to avoid insolvency by a preference just as they were. A minor is not exempt from the defeat of an unlawful preference by section 60b of the Bankruptcy Act as amended [11 USCA § 96]." * * *

BELIVEAU v. AMOSKEAG MFG. CO.

Supreme Court of New Hampshire, 1895. 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577.

Action by Edourdina Beliveau, by next friend, against Amoskeag Manufacturing Company. On motion by the plaintiff to strike off the docket entry "Judgment for the plaintiff by agreement. Judgment satisfied,"—made in accordance with a written agreement entered into by the attorneys of the parties, entitled as of the term, and filed with the clerk while the court was in session, as follows: "It is agreed that judgment in this case be entered for the plaintiff in the sum of one thousand dollars and costs, and judgment satisfied in full." Denied.

The action is case for injuries to the plaintiff's person, and was commenced by her attorney, C., in February, 1891. In August, 1891, the plaintiff discharged C., and engaged other counsel, who did not, however, appear or enter their names on the docket. C. continued to act for the plaintiff, and remained her only attorney of record. September 25, 1891, the defendants, by their attorney, in good faith, without knowledge, or, so far as appears, reason, to suppose that C. was not the plaintiff's attorney, entered into the foregoing agreement, and paid the stipulated sum ($1,000) to C., who appropriated the same to his own use, and absconded.

[Opinion of CARPENTER, J., denying motion, omitted.]

The plaintiff moved for a rehearing.

BLODGETT, J. In arriving at the conclusion that the motion must be denied, the authorities have not been overlooked which hold that an infant cannot employ an attorney or an agent, or make a valid agreement to compromise his suit (Biddell v. Dowse, 6 Barn. & C. 255; Armitage v. Widoe, 36 Mich. 124; Lawson, Rights, Rem. & Prac.

§ 824; Tapley v. McGee, 6 Ind. 56; Wainwright v. Wilkinson, 62 Md. 146), or those which hold that the "next friend" of an infant is not his agent or attorney, but an officer of the court, who derives his authority not from the infant, but from the court (Guild v. Cranston, 8 Cush. [Mass.] 506; Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530; Morgan v. Thorne, 7 Mees. & W. 400). However this may be, it must be conceded that rights and remedies are as much the inherent birthright of an infant as of an adult, and, if this be so, it necessarily follows from his disability to enforce such rights and remedies that the infant must have the right to enforce them through the assistance of another. By what name such other person may be called is immaterial. He may be styled, or may be in fact, the guardian, the parent, or the next friend; but, in the very nature of things, he is, and must be held to be, the representative of the infant, and to have the power to bind him by his proper and lawful acts. Among such acts, is that of bringing suit for any cause of action which has accrued in the infant's favor; and for this purpose the representative may, in the exercise of an undoubted authority, employ an attorney at law in the management and control of the suit (Davis v. Merrill, 47 N. H. 208, 210, 211), which, "although attended by a next friend, is the suit of the infant" (Bartlett v. Batts, 14 Ga. 539). In such a case, the attorney becomes clothed with the ordinary powers pertaining to an attorney of record. Railroad Co. v. Fitzpatrick, 36 Md. 619, 628. His authority is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied. The bringing of a suit in the infant's behalf being rightful, it follows, as a legal consequence, that, if judgment is properly rendered against him, he will be concluded by it (Guild v. Cranston, 8 Cush. [Mass.] 506, 509; Tripp v. Gifford, supra); for there is no distinction between an infant and an adult with regard to the binding effect of a judgment (Smith v. McDonald, 42 Cal. 484; Ralston v. Lahee, 8 Iowa, 23, 74 Am. Dec. 291; Waring v. Reynolds, 3 B. Mon. [Ky.] 59; Wills v. Spraggins, 3 Grat. [Va.] 567; Porter v. Robinson, 3 A. K. Marsh. [Ky.] 254, 13 Am. Dec. 153; Albee v. Winterink, 55 Iowa, 184, 7 N. W. 497; Porter v. Robinson, 13 Am. Dec. 159, note; Ralston v. Lahee, 74 Am. Dec. 298, note; Freem. Judgm. [4th Ed.] §§ 151, 513). "He will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error" (Freem. Judgm. § 513); and no recognizable distinction is believed to exist between the case of an entry of judgment in regular course by an attorney of a party sui juris and the case of a like entry by an attorney properly employed by the representative of an infant to conduct the suit. The authority of attorneys of record to make such entries is always presumed, if nothing appears to the contrary, and when made they are conclusive,

as between the parties, in the absence of fraud or mistake; and we apprehend it makes no difference, practical or legal, whether the agreement of the counsel to make them is expressed orally in open court, and the entries are thereupon made upon the records by its order, or whether the agreement is reduced to writing by the counsel, and duly filed and entered upon the records, without being expressly brought to the court's attention, and without obtaining its sanction, which in practice is never refused, and, at most, is but the merest formality. In such a case, the assent of the court is to be presumed. In our opinion, the law in cases like the present one is correctly stated in Tripp v. Gifford, supra, which recognizes the fact of an extensive practice with regard to the adjustment and settlement of such cases, and in which it is said (page 109, 155 Mass., and page 208, 29 N. E. [31 Am. St. Rep. 530]): "Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made, and the judgment entered, without calling the attention of the presiding justice to it, or obtaining his approval. That such judgments conclude the minor, we have no doubt; * * * and even in equity, if a decree is rendered against him without special inquiry, he will be bound by the decree." Motion for rehearing denied.[13]

SMITH, J., did not sit. DOE, C. J., dissented. The others concurred.

[13] Accord: Metzner v. Newman, 224 Mich. 324, 194 N. W. 1008, 33 A. L. R. 98 (1923); Strong v. New Hampshire Box Co. (N. H.) 131 A. 688 (1926). But see Pittsburgh, C., C. & St. L. Ry. Co. v. Haley, 170 Ill. 610, 48 N. E. 920 (1897).

See 10 Am. & Eng. Enc. of Law (1st Ed.) pp. 679–697, for a discussion of procedure in suits by or against infants.

NOTE ON VARIOUS LEGAL LIABILITIES WHICH ARE BINDING UPON AN INFANT.—Liability of husband for wife's antenuptial debts. Butler v. Breck, 7 Metc. (48 Mass.) 164, 39 Am. Dec. 768 (1843); Roach v. Quick, 9 Wend. (N. Y.) 238 (1832); Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258 (1853).

Liability of infant on a bond given to avoid arrest in a bastardy proceeding, People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272 (1847); and on a bond given to dissolve an attachment, Sanger v. Hibbard, 2 Ind. T. 547, 53 S. W. 330 (1899). In People v. Mullin, 25 Wend. (N. Y.) 698 (1840), it was held that an infant, imprisoned upon an execution issued upon a judgment in tort, could make a binding assignment of his property and thereby become entitled to a discharge from imprisonment. But see Defries v. Davies, 3 Dowl. 629 (1835). An infant may be imprisoned for contempt for failure to pay alimony. Ex parte Mosier, 114 Okl. 234, 245 P. 992 (1926).

NOTE ON STATUTORY CHANGES AFFECTING THE LAW OF INFANCY.—In a few states it is provided that an infant over eighteen must restore the consideration received by him in order to disaffirm. See e. g., Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49 (1909); Rice v. Anderson, 39 Okl. 279, 134 P. 1120 (1913). To the effect that, under such a statute, a contract made by an infant under eighteen is void and not capable of ratification, see Maier v. Harbor Center Land Co., 41 Cal. App. 79, 182 P. 345 (1919). See, also, Gruba v. Chapman, 36 S. D. 119, 153 N. W. 929 (1915). In New York, by statute, an infant over fifteen can contract for life insurance. Collins & Co. v. Wacker (Sup.) 188 N. Y. S. 71 (1921). In some states an infant's receipt, given upon the withdrawal of his funds in a bank, is made binding by statute. See, e. g., Peterson v. Weimar, 181 Wis. 231, 194 N. W. 346 (1923); Barnes' W. Va. Code, 1923, c. 54, § 81b(16).

In Mississippi and Arkansas, the chancery court has power to authorize an infant to contract under certain circumstances. Bickle v. Turner, 133 Ark.

CHAPTER 4

LIABILITY OF INFANTS FOR TORTS

HUCHTING v. ENGEL.

Supreme Court of Wisconsin, 1863. 17 Wis. 230, 84 Am. Dec. 741.

Error to the Circuit Court for Dane County.

Huchting brought an action before a justice of the peace against Moirtz Engel, for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The answer, after a general denial, stated that, if the defendant ever committed the alleged trespass, "he did so through the want of judgment and discretion, being an infant of about six years of age." On the trial before the justice, the plaintiff proved the alleged trespass and damages; and, on the part of the defense, it was shown that the defendant, at the time of the trespass, was but little more than six years old. A motion to dismiss the action, on the ground that the defendant was "of such tender years that a suit at law could not be maintained against him, nor execution issued on a judgment against him," was overruled. The justice rendered judgment against the defendant for $3 damages, with costs. The circuit court, on appeal, reversed the judgment; and the plaintiff sued out his writ of error.

By the Court, DIXON, C. J. "Infants are liable in actions arising ex delicto, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for, in case of civil injuries with force, the intention is not regarded, for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable

536, 202 S. W. 703 (1918); Watson v. Peebles, 102 Miss. 725, 59 So. 881 (1912). In Georgia, by statute, an infant practicing a profession or trade or engaged in business may make binding contracts with reference thereto. See Pearson v. White & Cochran, 13 Ga. App. 117, 78 S. E. 864 (1913).

This note is not, of course, intended to be exhaustive. It is inserted merely to call the attention of the student to some of the types of statutory changes which have been made. Local statutes and the decisions thereunder must be consulted.

NOTE ON ACTS DONE AT INFANT'S DIRECTION.—In Welch v. Welch, 103 Mass. 562 (1870), it was held that the maker of an obligation to pay money to an infant, who paid the money to a third person upon the infant's order, was not liable to the infant who attempted to disaffirm the order. However, in Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995 (1924), a stockbroker who sold an infant's stock was held to be a converter ab initio, upon the infant's subsequent disaffirmance.

to actions for wrong done by them, as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed. Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature, as disseisins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." Hartfield v. Roper, 21 Wend. (N. Y.) 620, 34 Am. Dec. 273.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. Jennings v. Randall, 8 Term, 335; Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. (Mass.) 492; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 531; Bullock v. Babcock, 3 Wend. (N. Y.) 391; Neal v. Gillett, 23 Conn. 437; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.[1]

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants; to the question of negligence[2] on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskillfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge by reason of the neglect or want of proper care of such parents or guardians.[3] The case at bar is none of these. The defendant is not prosecuted criminally; the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him; not vindictive or punitory damages, but compensation; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.[4]

1 Accord: Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457 (1859).

2 The question of an infant's negligence or contributory negligence is considered in the various casebooks on torts. See Briese v. Maechtle, 146 Wis. 89, 130 N. W. 893, 35 L. R. A. (N. S.) 574, Ann. Cas. 1912C, 176 (1911).

3 See supra, p. 112, for treatment of this question.

4 In Huggett v. Erb, 182 Mich. 524, 148 N. W. 805, Ann. Cas. 1916B, 352 (1914), it was held that, though an infant of tender years may be a technical trespasser upon a railroad track, yet the usual rule with reference to the liability of a landowner to a trespasser does not apply to him.

MAD.D.R.

McCABE v. O'CONNOR et al.

Supreme Court of New York, Appellate Division, 1896. 4 App. Div. 354, 38 N. Y. Supp. 572.

MERWIN, J. * * * The appellants are four in number, three of whom are now infants and the other one was an infant at the time of the injuries complained of.

It is found by the referee as matter of fact: That on the 15th day of September, 1890, John O'Connor, their father, was appointed general guardian of their persons and property, and duly qualified and immediately entered upon his duties as such, and has so continued as to those not of age up to the present time. "That all of said infants lived with their father and general guardian on the premises mentioned in plaintiff's complaint, on which the wall in question was erected at the time said wall fell, and for several years previous thereto.

"Third. That during the year 1891, and for several years previous, defendant John H. Malone lived on said premises mentioned in said complaint, occupied by the infant defendants.

"Fourth. That during the year 1890 and for some time prior thereto, the plaintiff owned the premises described in the complaint, situated on the east side of Congress street, in the Fifth Ward of the city of Troy, N. Y.

"Fifth. That at the time and for more than three years prior to the commencement of this action the defendants were the owners of a stone wall and the premises on which it stood, to wit, lots Nos. 186, 187, 188, 189 and 192, adjoining plaintiff's property on the east, as described in the complaint.

"Sixth. That on the 25th day of March, 1891, said wall fell on plaintiff's property.

"Seventh. That said wall was defective and fell through the carelessness and negligence of the defendants.

"Eighth. That about five months before said wall fell the defendant John H. Malone was notified personally of its defect.

"Ninth. That by reason of defendants' negligence and the falling of the wall as aforesaid plaintiff was damaged to the amount of two hundred dollars."

As matter of law the referee found that the plaintiff was entitled to judgment against the defendants for damages in the sum of $200 with interest from the commencement of the action and costs.

The claim of the appellants is that, as they were infants and had a general guardian at the time of the injury, they are not chargeable with negligence, and are not responsible for the injury.

In 2 Kent's Commentaries, 241, it is said: "Infants are liable in actions arising ex delicto, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds."

In Cooley on Torts (2d Ed.) 122, it is said: "An infant as the

owner or occupant of lands is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor. Here, also, the intent is immaterial. The wrong consists in the fact that enjoyment of one's own property or rights is diminished or destroyed by an improper use or unreasonable use or misuse of the property of another."

Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, was an action in tort for personal injuries occasioned to the plaintiff by the defective condition of a building owned by the defendant, who was a lunatic, and of whom a guardian had been appointed, who, at the time of the injury, had the care and management of all her property. It was held that the defendant was liable, and it was said: "This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which the lunatic himself, and not his guardian, is the owner. Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587, 591. The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him. Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Bartlett v. Boston Gaslight Co., 117 Mass. 533, 19 Am. Rep. 421. And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities of ownership of real estate." The same doctrine is asserted in 16 American and English Encyclopedia of Law, 409. This doctrine would apply as well to infants as to lunatics.

The general rule is that a person must so use his property as not to injure that of his neighbor. Moak's Underhill on Torts, 229. In Vincett v. Cook, 4 Hun, 318, it was held that failure on the part of the owner of a building to keep it in a safe condition and resulting damages throw upon the owner the burden of showing that the building was safe so far as diligent examination would show. The same view was taken in Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. These cases related to the walls of a building, but there is no good reason apparent why the principle should not apply to a case like the present where the wall was entirely on defendant's land and was about twenty feet high, as appears from the complaint and answer. Nor is it clear that an owner in such a situation should be relieved of liability by saying that he is an infant and has a general guardian whose duty it was to keep the premises safe, but failed to do his duty.

Negligence is found here as a matter of fact. What the proofs were we cannot say, as the evidence is not here. It may have been shown that negligence was based on their personal acts. It was found that

they occupied the property. If occupants, clearly they might under proper proofs, be charged with negligence. 2 Addison on Torts, 1126; Schouler's Dom. Rel. (2d Ed.) 564. We cannot reverse if in any view of the facts found the judgment was proper.

But it is said that no notice to the appellants was found. If there was no failure of duty until notice, then the finding of negligence presupposes the existence of such notice or knowledge as would be requisite to call upon the owner to act, and involves a finding to that effect. Notice is found to a co-tenant in occupation. If the infants were to be deemed occupiers, it would not follow as a matter of course that they would be entitled to notice.

The appellants have not, I think, shown that in any view of the facts found the judgment was not proper. It should, therefore, be affirmed.[5]

PARKER, P. J., and LANDON, J., concurred. PUTNAM and HERRICK, JJ., dissented.

HERRICK, J. (dissenting). I am unable to concur in the opinion of Justice MERWIN in this case. Negligence is a violation of or omission to perform some duty. There can be no duty unless there is a power to fulfill it.

The guardian has absolute control of the lands and property of his ward. By statute it is the duty of the guardian not to "make or suffer any waste, sale or destruction of such things or of such inheritance, but [he] shall keep up and sustain the houses, gardens and other appurtenances to the lands of his ward by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his hands." 2 Rev. St. 153, § 20 (Birdseye Ed. p. 1292, § 44); 2 Kent's Comm. 228. The guardian can lease the land of his ward until he attains the age of twenty-one years, and may maintain an action of trespass or ejectment. Thacker v. Henderson, 63 Barb. 271. The guardian having entire control of their property, the infants in this case were not in a position to either remove the wall in question or to repair and maintain it in a safe condition.

Again, negligence is actual or implied. There can be no actual or personal negligence charged on the part of the infant defendants, because they had no legal or actual control over the property in question. The negligence of their guardian cannot be implied or imputed to them as in the case where the principal is held responsible for the acts of an agent or the employer for the negligence of his employés; that proceeds upon the theory that the superior is responsible for the action of the inferior.

In the case of guardian and ward, the superior authority is that of the guardian, and the negligence of the superior is that of the guardian, and the negligence of the superior cannot be implied or attributed

[5] An infant employer is not liable for the torts of his employee. Covault v. Nevitt, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092, Ann. Cas. 1916A, 959 (1914); Cooley on Torts (3d Ed.) 188.

to the inferior. The ward does not direct or control the guardian, but the guardian the ward. In the absence of any finding of actual or personal negligence on the part of the infants, I do not think the judgment of negligence can be sustained against them. The case of Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, does not seem to me entirely a parallel one. The interest of a committee of a lunatic in the property of the latter is different from that of a guardian in the estate of a ward. A committee of a lunatic is held to be a mere bailiff or agent to take care of and administer the property of the lunatic (Matter of Strasburger, 132 N. Y. 128, 30 N. E. 379; People ex rel. Smith v. Commissioners of Taxes, 100 N. Y. 215, 3 N. E. 85); while, as we have seen, a guardian has the possession, custody and control of his ward's land.

Judgment affirmed, with costs.

FITTS v. HALL.

Superior Court of Judicature of New Hampshire, 1838. 9 N. H. 441.

The plaintiff was induced to sell hats to the defendant by reason of the latter's false and fraudulent representations that he was of full age. The defendant gave to the plaintiff a note for the price. The plaintiff sued the defendant upon this note. The defendant pleaded infancy and recovered judgment and costs. This action was then brought. There were two counts, one in case for deceit and the other in trover. The court instructed the jury that the action was sustainable in point of law. Verdict for the plaintiff. Motion to set aside verdict and enter non-suit.

PARKER, C. J. [held, first, that there was no cause of action in the trover count. This part of the opinion is given ante, p. 262. The court then proceeded to consider whether the count in deceit stated a cause of action. This part of the opinion is as follows:]

The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note.

An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. 3 Pick. (Mass.) 33, 36, Livermore v. Herschell.

But Johnson v. Pie, 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100., and so he had cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others.

"Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses. Dyer, 105. And so, if he cheat with false dice, &c." The report in Levinz states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested.

If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the Case for Deceit," but lays down the rule that, "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites, 1 Sid. 183. Com. Dig. Action &c., A, 10.

We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds, (2 Kent, 197,) as for slander, (Noy's Rep. 129, Hodsman v. Grissel,) and goods converted, (auth. ante,) there is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation, whereby another has received damage.

In the argument of Johnson v. Pie, Grove & Nevill's case was cited, "where, in case against an infant, for selling a false jewel, affirming it to be a true one, 'twas adjudged the action did not lie," and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove & Nevill's case the subject matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, assumpsit might have been maintained. The infant was not to be charged, by adopting a different form of action. But the representation in Johnson v. Pie, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely ex delicto. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answer-

able for one committed before the contract was entered into, although it may have led to the contract.

It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed.

In Bac. Abr., Infancy, I, 3, it is said—"Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if by combination with his guardian, &c., he make any contract of agreement, with an intent afterwards to elude it by reason of his privilege of infancy that a court of equity will deem it good against him according to the circumstances of the fraud." 3 Gwillim's Bac. 604. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition that an infant may be bound, in equity, by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. 2 Ves. Sr. 212, Lord Teynham v. Webb; 2 Eq. Cas. Abr. 489, Evroy v. Nicholas, and case cited; 1 Brown's Ch. Rep. 358, Beckett v. Cordley; Fonblanque's Eq. (4 Am. Ed.) 80, note z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105, Conroe v. Birdsall. If, in equity, the infant may be bound by the contract, because of his fraud in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part.

Our conclusion is that the action may be sustained on the first count.

But we are of opinion that the plaintiff is not entitled to recover, in damages, the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and a

New trial granted.[6]

[6] In Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53 (1886), a suit for damages under the system of Code Procedure, alleging that the defendant had falsely represented himself to be of age and had thereby induced the plaintiff to sell him certain chattels, was held good on demurrer. The court said that there would be a liability in equity, and that, under the Code, merging law and equity, the action would lie.

In Butler Bros. v. Snyder, 81 Ind. App. 44, 142 N. E. 398 (1924), an infant who represented a forged warranty to be genuine and thereby obtained merchandise was held liable in tort.

In Mathews v. Cowan, 59 Ill. 341 (1871), a count for fraud in securing the

SLAYTON v. BARRY.

Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510.

Tort, for deceit and for conversion. Trial in the Superior Court, before Blodgett, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The material facts appear in the opinion, and in the following note by the reporter:

"The plaintiff requested the judge to instruct the jury: (1) That if the defendant, a minor, for the purpose of defrauding the plaintiff and inducing him to sell and deliver goods to the defendant falsely represented that he was of full age, and the plaintiff, relying on such representation, was thereby induced to sell and deliver goods to the defendant, who subsequently repudiates his purchase and refused to pay for the goods for the reason that he was a minor, he is liable in damages. (2) That if the defendant, a minor, purchased goods of the plaintiff, obtained possession of them, converted them to his own use, and subsequently repudiated the purchase and refused to pay for the goods for the reason that he was a minor, the plaintiff at the time of the purchase having no knowledge of the defendant's minority, the effect of the avoidance by the defendant of his contract was to make it void from the beginning, and to render him liable in damages for the conversion of the goods."

MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age and thereby induced the plaintiff to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. Merriam v. Cunningham, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; Grove v. Nevill, 1 Keb. 778; Jennings v. Rundall, 8 Term R. 335; Green v. Greenbank, 2 Marsh. 485; Price v. Hewett, 8 Exch. 146; Wright v. Leonard, 11

delivery of chattels previously purchased under an agreement to pay cash, by giving a worthless check, was upheld against the defense of infancy, on the ground that the fraud followed the contract, and was not a part of it.

C. B. (N. S.) 258; De Roo v. Foster, 12 C. B. (N. S.) 272; Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; Ferguson v. Bobo, 54 Miss. 121; Brown v. Dunham, 1 Root (Conn.) 272; Geer v. Hovy, 1 Root (Conn.) 179; Wilt v. Welsh, 6 Watts (Pa.) 9; Burns v. Hill, 19 Ga. 22; Kilgore v. Jordan, 17 Tex. 341; Benjamin, Sales (6th Ed.) § 23; Cooley, Torts (2d Ed.) 126; Add. Torts (Wood's Ed.) § 1314. See contra, Fitts v. Hall, 9 N. H. 441; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Wallace v. Morss, 5 Hill (N. Y.) 391.

The general rule is, of course, that infants are liable for their torts. Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. 492; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be as stated in Liverpool Adelphi Loan Association v. Fairhurst, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract * * * and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent, Comm. (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant] must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition it would be better if the rule were as laid down in Fitts v. Hall, supra, and Hall v. Butterfield, supra, in New Hampshire, and Rice v. Boyer, ubi supra, in Indiana, we need not consider. The plaintiff relies on Homer v. Thwing, 3 Pick. 492, Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, and Walker v. Davis, 1 Gray, 506. In Walker v. Davis, supra, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore clearly, as a conversion. Badger v. Phinney, supra, was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In Homer v. Thwing, su-

pra, the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled. So ordered.[7]

NOLAN v. JONES.

Supreme Court of Iowa, 1880. 53 Iowa, 387, 5 N. W. 572.

Action to replevy a mare alleged to be worth $99. The petition avers that the plaintiff is the unqualified owner of the mare, and entitled to the immediate possession of her; that the defendant falsely pretended to have entered into a contract of exchange whereby the defendant gave the plaintiff a horse for the mare; that the plaintiff tendered the horse to defendant and demanded a return of the mare, which was refused. The defendant, appearing by guardian ad litem, avers in his answer that he is a minor; that he is the owner of the mare by a valid contract of exchange, whereby he gave the plaintiff a horse for her. There was a trial by jury. The plaintiff introduced evidence tending to show that he was the owner of the mare at the time of the commencement of the action, and was in possession of her five days previous to that time. The plaintiff, as a witness in his own behalf, was then asked to state the circumstances of his parting with the possession of the mare. This question was objected to by the defendant as immaterial, and because there was no allegation in the petition under which the testimony was admissible. The court sustained the objection, and the plaintiff excepted.

The defendant then introduced evidence tending to show that he was the owner of the mare by a valid contract of exchange, whereby he gave the plaintiff a horse for her. The plaintiff, for the purpose of rebuting this evidence, introduced witnesses and offered to prove by them that the alleged contract of exchange was procured by the defendant's

[7] Accord, on the question of deceit, R. Leslie, Limited, v. Sheill, [1914] 3 K. B. 607; Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953, 114 Am. St. Rep. 594 (1906).

It has been generally held, even in New Hampshire, where Fitts v. Hall, 9 N. H. 441 (1838), supra, p. 310, was decided, that a false warranty in a sale of property by an infant cannot be sued for in deceit. Prescott v. Norris, 32 N. H. 101 (1855); Green v. Greenbank, 2 Marsh, 485, 4 E. C. L. 375 (1816); West v. Moore, 14 Vt. 447, 39 Am. Dec. 235 (1842); Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659 (1865); Doran v. Smith, 49 Vt. 353 (1877). Contra: Vance v. Word, 1 Nott & McC. (S. C) 197, 9 Am. Dec. 683 (1818). See Williston, Sales (2d Ed.) § 27.

In Patterson v. Kasper, 182 Mich. 281, 148 N. W. 690, L. R. A. 1915A, 1221 (1914), it was held that an infant who sold and falsely warranted a horse was liable in assumpsit to the purchaser for the amount paid. There was no showing that the infant still had the purchase money. Cf. Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721, 38 L. R. A. (N. S.) 202, Ann. Cas. 1913A, 969 (1911); Shenkein v. Fuhrman, 80 Misc. Rep. 179, 141 N. Y. S. 909 (1913).

An infant who has embezzled money may be sued in assumpsit. Bristow v. Eastman, 1 Esp. 172, Peake, 291 (1794); Patterson v. Kasper, supra, semble.

fraud; that the horse had the glanders; that the defendant knew it at the time and took steps to conceal it, representing that the horse was sound; that the plaintiff traded relying upon the representation; that shortly afterwards he discovered that the horse had the glanders, and thereupon he tendered the horse back to the defendant and demanded the mare; but that the defendant refused to surrender her. The defendant objected to the admission of the offered evidence, on the ground that it was immaterial and irrelevant to the issue, and was incompetent as against a minor. The court sustained the objection and plaintiff excepted. There was a verdict for the defendant, and judgment was rendered thereon. Plaintiff appeals.

ADAMS, C. J. In the certificate of appeal seven questions are certified, but in our opinion they may properly be reduced to two, viz.: whether the offered testimony was admissible under the pleadings, and if so, whether it was admissible as against a minor. The defendant insists that the testimony was inadmissible, because it was offered to show fraud, and there was no allegation of fraud in the petition, and none in a reply to the answer, no reply having been filed. This action was not brought to rescind a contract, nor to recover damages for fraud. It was brought upon the simple theory that the plaintiff had the title to the mare and right of possession. The plaintiff's averment, when set out in full, is as follows: "That at the commencement of this action he was and still is the unqualified and absolute owner by purchase of one dark sorrel mare named Jenny; that plaintiff then was and still is entitled to the immediate possession thereof; that the defendant wrongfully detains the property from the plaintiff."

Ordinarily, this would certainly be sufficient to enable him to prove title and right of possession. But the plaintiff went further than that in his averments. He had parted with the possession under a supposed contract of exchange. He avers, in substance, that the defendant relies upon such contract, but that his pretenses, in regard to the existence of such contract, are false. He does not expressly aver that he was induced to make the exchange by fraud, but he does negative the validity of the contract; and we think it was proper for him to introduce evidence to show that the pretended contract was void. The action was brought originally before a justice of the peace, where not quite the same strictness of pleading is required as in the district or circuit court. It only remains to be considered whether the evidence of fraud was inadmissible as against a minor.

In determining this question it should be borne in mind that the action is not brought to recover damages for deceit or fraud in a sale. If so, it would be necessary for the plaintiff to affirm the sale. "An action on a sale is an affirmance by the plaintiff of the sale." Cooley on Torts, 107. Now, as a minor cannot make himself liable upon his contracts of sale, no action for damages for deceit or fraud in a sale can be maintained against him. But the plaintiff's case proceeds upon the theory that there was no sale, and if what he offered to prove was true, there

certainly was none unless the law is that fraud by a minor in procuring a contract will not vitiate it. Our attention has been called to no case where such doctrine has been held, and such, we think, is not the law.

In our opinion, the circuit court erred in excluding the offered evidence.

Reversed.[8]

YOUNG v. MUHLING.

Supreme Court, Appellate Division, Second Department, 1900. 48 App. Div. 617, 63 N. Y. Supp. 181.

WILLARD BARTLETT, J. At the time of the transactions involved in this suit the defendant was a minor. About the middle of June, 1898, he went to the plaintiff's livery stable at Spring Valley, in Rockland county, and ordered a team with which to go to Haverstraw on the third of July following. He told the plaintiff's agent in charge of the stable that he wanted to drive to Haverstraw and "cut a swell" there, and the agent swore that he let him the horses for that purpose. The arrangement was that the team should be delivered at the defendant's house in the village of Monsey, on July 3, 1898, at half past 12 o'clock in the afternoon. The team was brought to the defendant's residence at Monsey at the time specified by the plaintiff's agent, who then asked the defendant where he intended driving. According to the testimony of this witness, the defendant responded: "I am going direct to Haverstraw, put the team in, have them fed and cared for, and return home in the evening." The witness responded: "You need not hurry to get home; if you are detained by your friends longer than you expect, come home at 10 o'clock, and later if necessary, but don't injure the team." Accompanied by a friend the defendant drove the team to Haverstraw, by way of Nanuet and the Short Clove, which is a somewhat longer route than another road which he might have taken. The day was extremely hot, and on the way homeward in the evening one of the horses was overcome and died from the effects of what we must assume to have been heat and over-exertion. This action is brought to recover damages against the defendant for a malicious abuse of the plaintiff's team, resulting in the death of one of the horses and injury to the other. The complaint also alleges that the defendant drove said team not only to Haverstraw, but to divers other and more distant places in and about the county of Rockland. The answer contains a denial of the material allegations of the complaint, except those which relate to the hiring of the team, and also sets up a plea of infancy.

[8] Accord: Pritchett v. Fife, 8 Ala. App. 462, 62 So. 1001 (1913), detinue. Cf. Fitts v. Hall, 9 N. H. 441 (1838), supra, p. 310; Mathews v. Cowan, 59 Ill. 341 (1871); Ashlock v. Vivell, 29 Ill. App. 388 (1888), for the use of trover in such cases.

Although the complaint alleges and the answer admits that the contract of hiring was entered into on or about the 2d day of July, 1898, the testimony on both sides shows that a complete agreement in respect to the letting of the team was made about two weeks earlier. That agreement did not bind the defendant to drive to Haverstraw by the shortest route. It left him at liberty to pursue any usually traveled road which people were accustomed to take who desired to go from Monsey to Haverstraw. The voluntary statement on his part, when the team was brought to his residence on the third of July, that he proposed to go direct to Haverstraw, did not, under the circumstances, in my opinion, become a binding part of the contract of hiring; but, if I am wrong in this, I am nevertheless of opinion that the use of the word "direct" did not necessarily imply an engagement to go by the very shortest way. It should be regarded as signifying merely the defendant's intention to proceed by some usual and expeditious route, without diverging from it. In this view, it becomes immaterial whether the contract was to drive direct to Haverstraw, or merely to drive to Haverstraw. In neither aspect of the case does the evidence establish any substantial departure from the terms of the contract. The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort, merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract. This qualification of the doctrine was recognized by the learned trial judge, who properly charged the jury that there must be a substantial and material departure from the contract of hiring in order to render his plea of infancy unavailable to the defendant.

But in my opinion the defendant was entitled to a dismissal at the close of the evidence on both sides, and the case should not have been submitted to the jury at all. The rule applicable to the case cannot be better stated than it is in the language of Chancellor Kent in Campbell v. Stakes, 2 Wend. 137, 19 Am. Dec. 561, where he says: "The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either would not subject him or an adult to an action of trespass, the contract remaining in full force. But if the infant does any willful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort." See, also, Moore v. Eastman, 1 Hun, 578, and cases there cited.

It is essential, to hold an infant for trespass in a suit like this, to show that the injury to the horse was willful and intentional. A mere

lack of moderation in driving and a failure to observe due care, where there is no willful and intentional injury, will not suffice to render an infant liable. As Chief Justice Cooley says: "If case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment." Cooley, Torts (2d Ed.) 123.

There is no evidence in the present case sufficient to warrant a finding that the injuries which the plaintiff's team sustained were intentionally inflicted by the defendant. On the contrary, it is tolerably plain that the death of one of the horses and the sickness of the other were simply due to the fact that they were driven a long distance during the hottest portion of an exceptionally hot day in midsummer. The only testimony tending to show that there had been a material departure from the terms of the contract by driving to Nyack instead of to Haverstraw was furnished by the alleged admission of the defendant to that effect, immediately after the death of the plaintiff's horse. This admission, however, was fully explained by the defendant, who said that he was frightened and excited at the time of the accident, and might have said to the plaintiff's representative at the livery stable that he went to Nyack instead of Haverstraw, but that if he did so he meant New City and not Nyack. This statement, taken in connection with his own positive denial and that of his friend, and the proof on both sides that they had been to Haverstraw and spent the afternoon there, did not leave more than a scintilla of evidence in the case to show that the team had been driven to Nyack. Upon this record no verdict based on a finding that the defendant drove to Nyack instead of Haverstraw could be sustained for a moment.

I think it is clear that whatever liability can be predicated upon the defendant's management of the plaintiff's team arises out of contract, instead of tort, and to this liability his infancy constituted a complete defense.

I am, therefore, in favor of reversing the judgment. All concurred, except HIRSCHBERG, J., absent.

Judgment and order reversed and new trial granted, costs to abide the event.[9]

9 Accord: Brunhoelzl v. Brandes, 90 N. J. Law, 31, 100 A. 163 (1917), where the court said the infant borrower of an automobile would not be liable in the absence of "recklessness, wantonness, or gross negligence"; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189 (1870); Jennings v. Rundall, 8 Term R. (Durn. & East) 335 (1799).

In Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744 (1901), where the infant owner of a threshing outfit, who had been employed to thresh the plaintiff's grain, was negligent in the location of his engine and in having no spark arrester on it, and thereby set fire to the plaintiff's shed, was held not liable in tort. The court said, "The test of an action against an infant is whether a liability can be made out without taking notice of the contract."

FREEMAN v. BOLAND.

Supreme Court of Rhode Island, 1882. 14 R. I. 39, 51 Am. Rep. 340.

DURFEE, C. J. The question here is whether an infant or minor who hires a horse and buggy to drive to a particular place, and who, having got them under the hiring, drives beyond the place or in another direction, is liable in trover for the conversion. We think he is. There are cases in which infancy has been held to be a good defence to an action ex delicto for tort committed under contract or in making it. But that is not this case. The act here complained of was committed, not under the contract, but by abandoning it; the bailment being thus determined.

The contract cannot avail if the infant goes beyond the scope of it. The distinction may be subtle, but it is well settled, and has been often applied in support of actions precisely like this. It is true the contract must be generally put in proof to support the action but this is because the tort, inasmuch as it is committed by departing from the terms of the contract, cannot be shown without showing the contract, and not because the contract is otherwise involved. Homer v. Thwing, 3 Pick. (Mass.) 492; Towne et al. v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Fish v. Ferris, 5 Duer (N. Y.) 49; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Addison on Torts, § 1314.

We understand that the defendant does not ask us to decide the questions raised by the other exceptions, the exceptions being waived.

Exceptions overruled.[10]

WILT v. WELSH.

Supreme Court of Pennsylvania, 1837. 6 Watts, 9.

Error to the Common Pleas of York County.

Charles Welsh against Peter E. Wilt. Declaration in trover to recover the price of a horse. Pleas, not guilty and the infancy of the defendant. To the latter plea the plaintiff demurred. The facts of the case, as given in evidence by the plaintiff, were, that the defendant had hired a horse from him to ride to a particular place, and that he drove him to another more distant place, in consequence of which the horse sickened and died. After much evidence was given on both

10 Accord: Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64 (1899). In Burnard v. Haggis, 14 Com. Bench, N. S. 45 (1863), an infant hired a mare, and was told not to jump her, but he let his friend do so, and the mare was killed. The infant was held liable ex delicto. See Cole v. Manners, 76 Neb. 454, 107 N. W. 777 (1906).

sides as to the facts, the jury found for the plaintiff, and the court rendered a judgment on the demurrer for the plaintiff.

The error assigned was, in rendering a judgment on the demurrer for the plaintiff.

The opinion of the court was delivered by

GIBSON, C. J. It would have been sufficient to rest the decision of this cause on the precedent of Penrose v. Curren,[11] if the point had not since been ruled differently by the Court of Errors of New York; but a respect for the opinion of that court renders it proper to re-examine the question on principle and authority. The ground of the New York case (Campbell v. Stakes) [12] is, that a positive breach of the contract is a disaffirmance which works a dissolution of it and reduces the infant to a level with an adult who is chargeable with a conversion for any act which subverts the nature of the bailment. That would, indeed, bring the common-law principle of protection within a narrow compass; for there are few breaches of a bailment that are not subversive of it. The supposed act of subversion, in cases like the present, is the overworking of a horse, or the otherwise abusing the thing bailed, which, by the way, is at the same time an indisputable breach of the contract, and ground sufficient for an action on it. This being so, it remains to be seen whether an infant is chargeable for it in the shape of a tort. There are two cases (Powell v. Layton, 2 N. R. 365, and Weall v. King, 12 East, 452), in which it is maintained that even an adult is not. In the latter of these, which was case against a carrier in the form of a tort, Sir James Mansfield remarked, in delivering the opinion of the court, that "the form of the action cannot alter the nature of the transaction;" and that, "though the nonperformance of that which is originally contract may be made the subject of an action of tort, the foundation of that action *must* still be contract." Acting on that principle, he allowed the defendant to plead the nonjoinder of his partners in abatement, which could not have been done if the incidents of the contract had not survived the form of the action. According to Campbell v. Stakes, however, the infant's privilege extends no further than to preclude a recovery for a constructive tort only by an action affirmative of the contract, and not by an action which appears on the pleadings to be for an independent trespass; but it will appear, from an uninterrupted series of British decisions which seem to have been misapprehended in the American courts, that the difficulty lies deeper than the form of the remedy. It will be seen that no court in Westminster Hall has taken any such distinction; and that, whereever the substantive ground of the action was contract, as well where the contract was stated as inducement to the supposed tort as where it was not, the plaintiff was discomfited. The first of these is Cross v.

11 3 Rawle (Pa.) 351, 24 Am. Dec. 356 (1832).

12 2 Wend. (N. Y.) 137, 19 Am. Dec. 561 (1828).

Androes, 1 Roll. Abr. p. 2, *action on the case,* D. 3, in which an infant was held to be irresponsible on the custom of the realm for goods committed to his custody as an innkeeper; and there the attempted cause of action was clearly collateral to the contract, as it was also in Williams v. Harrison, Carth. 160, which was an action on the custom of merchants against an infant as the drawer of a bill of exchange, and consequently not founded on a contract, for there is none betwixt a drawer and the payee; yet it was deemed sufficient for the infant in each of these, that the cause of action had grown even indirectly out of a contract. So in Grove v. Nevil, 1 Keb. 778, an action on the case in the nature of deceit was abortively attempted to be sustained against an infant who had sold another's goods as his own, because there was no actual tort, but only a tort by construction; and there too the action was in form collateral to the implied warranty of title which is the only contract that can exist in such a case; yet it was deemed sufficient for the defense that the gravamen was a transaction which had *originated* in contract. Johnson and Pye, 1 Keb. 905, was, if possible, still less affirmative of any contract, being an action on the case against an infant for having sealed a mortgage under a misrepresentation of his age; and Chief Justice Keeling is reported to have said that it would shake the very foundations of the common law to make him answerable for it, though there was clearly no stipulation or warranty, express or implied, that the mortgagor had attained the age of discretion. In Manby v. Scott, 1 Sed. 129, which was decided on great consideration after three full arguments before all the judges and barons in the Exchequer Chamber as well as repeated arguments in the King's Bench, it was solemnly resolved that, "if one deliver goods to an infant on contract, knowing him to be an infant, the infant shall not be charged in trover for them, for by that means all the infants in England might be ruined." In this, we have a proof of the prevailing efficacy of infancy as a defense to an action founded, not even in affirmance of a contract, but in property exclusively; and the reason given for it shows it to have been thought to rest, not on considerations of technical congruity, but on a broad principle of public policy. In the same emphatic tone, Lord Kenyon declared, in Jennings v. Rundall, 8 Tr. 335, that, "if it were in the power of a plaintiff to convert that which arises from a contract into a tort, there would be an end to that protection which the law affords to infants; and Mr. Justice Grose quoted the resolution in Manby v. Scott, with approbation. That case, like Campbell v. Stakes and the present, was an action for overdriving a mare hired to an infant; and it was made to turn, not on a distinction between trespass and case, but on a rule of policy superior to forms and applicable to all cases. Indeed the privilege would be little worth if it might be eluded by fashioning the action into a particular shape. Lastly came Green v. Greenbank, 2 Marsh. 485, s. c. 4 Eng. C. L. R. 375, in which a fraudulent affirmation of soundness was not suffered to charge an infant with deceit because it had been made in the course of a contract. Thus have

run the British decisions from the earliest periods, certainly from the reign of Elizabeth, to the present day; and they have been followed by this court in Curtin v. Patton, 11 Serg. & R. 310, and Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356; opposed to which we have, beside Campbell v. Stakes, already noticed, the case of Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207, and three or four decisions of respectable courts in our sister states. In Hower v. Thwing, 3 Mass. 494, it was said that the distinction betwixt positive and constructive torts was expressly rejected in Jennings v. Rundall. That, however, is not the only misapprehension of the learned judge who delivered the opinion of the court. It was said also that the resolution in Manby v. Scott was predicated of goods *sold*. The words are: "Si un *deliver* biens al enfant pur contract, etc."—which import a bailment rather than a contract executed. But no difference in that respect can be material; for, if an infant rescind his purchase by refusing to execute his part of it, there is the same reason why the vendor should have an action on the right of property that there is why a bailor should have it in equal circumstances. Indeed the very case of an infant purchaser was precisely thus disposed of by the same court in Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; which shows how little any interpretation of Manby v. Scott has been respected by it. The others, Vasse v. Smith, Wheelock v. Wheelwright, and perhaps Piegne v. Sutcliffe, 4 McCord (S. C.) 387, 17 Am. Dec. 756, rest on no very distinctive principle, but assume that an act subversive of the contract is a conversion. But Campbell v. Stakes, though entitled to less authority merely as a decision, being the judgment of a popular court, yet distinctly enough discloses the foundation of the doctrine. The contract, it was justly said, comprises a promise to keep the thing from harm and return it at the stipulated time; for a negligent breach of which, it was admitted, the infant would not be liable as for a tort. But it was said that any positive act of injury inconsistent with the contract, would disaffirm it and leave him liable as if there had never been a contract. What is that but to make him a tort-feasor by construction? It is scarce maintainable, however, that a positive breach of the contract is an unqualified disaffirmance of it. Where the infant intended no disaffirmance, I am unable to see how the adult shall intend it for him, or insist that he rescinded the whole by perhaps an inconsiderable breach of a part. However convenient such a pretext might be to add a new responsibility to the predicament of the bailee or to extricate the bailor from an old one, it is to be remembered that the exercise of the privilege is not for the adult but the infant. I know nothing, nor did I ever before hear, of a constructive election to disaffirm in order to strip an infant of his privilege, and, by turning him from a contractor into a trespasser, to put him in a worse condition than if the contract had been indefeasible. Such a construction is not in keeping with the benign principles of the common law, which, in other cases, holds him only to such acts as are beneficial to him, and declares such as are positively detrimental to him to be posi-

tively void. Even were that otherwise, yet to give to an injury done to the thing bailed the character of an independent trespass would require the bailment to have been first terminated; for the very foundation of the argument is, that the contract was out of the way at the time; but, by the most attenuated construction, its cessation and the inception of the wrong, could be but simultaneous. On what principle, then, can it be a trespass? The distinction taken in the Six Carpenters' Case, 8 Co. 146, betwixt an authority given by the law, whose abuse makes the offender a trespasser from the beginning, and a license by the party, whose abuse does not, has never been questioned. The killing of beast destrained by the grantee of a rent charge makes not the distress a trespass, because it is given by the grant and not by the law. 1 Inst. 141. The reason is that a party is entitled to the best protection the law can give against the abuse of an authority delegated not by himself but by the law, which, to that end, makes void everything improperly done under it; while a party who gives an authority to an unsafe person has only himself to blame for it. 6 Wils. Bac. 561. Now, taking for granted that the act annihilated the contract, it cannot be denied that there was a precedent license, for an excessive use of which the infant is sought to be charged as for a trespass, with what pretense of reason, when an adult could not be so charged, it is unnecessary to say. The theory on which a breach of contract has been thus turned into a trespass is as incomprehensible to me as the theory on which a common recovery bars an entail; and why we should employ any juggle whatever to tear from an infant the defenses with which the law has covered his weakness is equally incomprehensible. In the American courts, the hardship of particular cases, as in the earlier decisions on the statute of limitations, seems to have run away with the law; but it is to be remembered that particular hardships are to be borne in giving effect to every general principle of policy. To fritter away the rule by exceptions such as these would expose a child of the most tender years to an action for the destruction of a delicate or dangerous instrument thoughtlessly or wickedly put into his hands; for, in contemplation of law, an infant of three years is not inferior in discretion to one of twenty. The mischiefs to which minors are exposed from the cupidity of those whose trade it is to pamper their appetites are sufficiently depicted in Penrose v. Curren; and we are not disposed to surrender the principle asserted in it. It is clear that the evidence of infancy ought to have been admitted; and that the court erred also in directing that, if the infant hired the horse to go to a particular place and injured him by going beyond it, he was guilty of a conversion.

Judgment reversed, and a venire facias de novo awarded.[13]

[13] Accord: Fawcett v. Smethurst, 31 Times Law Rep. 85 (1914), criticized in 28 Harv. L. Rev. 521, note. Cf. Caswell v. Parker, 96 Me. 39, 51 A. 238 (1901).

CHAPTER 5

RESPONSIBILITY OF INFANTS FOR CRIMES

KEY v. STATE.

Court of Appeals of Alabama, 1912. 4 Ala. App. 76, 58 So. 946.[1]

Nat Key was convicted of burglary, and he appeals. Affirmed.

DE GRAFFENRIED, J. The defendant was indicted for burglary. As burglary is a felony, and as sections 6450, 6456, 6463, and 6465 of the Code, as amended by the act entitled an act to amend the above sections of the Code, approved August 25, 1909 (Gen. & Local Acts of Ala. Special Session 1909, p. 117), apply only to children under 14 years of age who are charged with misdemeanors, not felonies, and defendant can claim no exemption by virtue of any of the statutes of Alabama covering the subject of juvenile delinquents from a conviction under the indictment in this case.

The presumption of the law is that an infant over seven and under fourteen years of age does not possess sufficient mental capacity to commit a felony, but this inference is rebuttable.

The question as to whether an infant over seven and under fourteen years of age does or does not possess sufficient mental capacity to commit a felony is ordinarily a question for the jury under the facts of each particular case. When the evidence discloses that a defendant in a felony case is over seven and under fourteen years of age, the presumption that he does not possess sufficient mental capacity to commit the crime goes to the jury subject to rebuttal by facts and circumstances or other evidence tending to show sufficient mental capacity on the part of the defendant to commit the crime. The presumption of mental incapacity becomes less strong with the increase of years, but until the age of fourteen is reached "the presumption is that he has not the requisite guilty knowledge of the wrongfulness or wickedness of the act charged to authorize a conviction of felony, unless rebutted by clear evidence of a mischievous disposition, or by proof of knowledge of good and evil, which knowledge must be made distinctly to appear from the evidence." [2] Reynolds v. State, 154 Ala. 14, 45 So. 894. The circumstances connected with the offense charged may be so proved as to satisfy the jury beyond a reasonable doubt that a defendant over seven and under fourteen years of age was at the time of the commission of the offense mentally capable of entertaining a criminal intent, doli capax. 16 Am. &

[1] Statement of facts is omitted.

[2] Accord: Garner v. State, 97 Ark. 63, 132 S. W. 1010, Ann. Cas. 1912C, 1059 (1910).

Eng. Ency. of Law (2d Ed.) 315. Under the evidence in this case, the question as to whether the defendant, who, according to the tendencies of the evidence, was about 13 years old when the crime was committed, possessed the requisite guilty knowledge of the wrongfulness of the act charged to authorize a conviction of the crime, was a question for the jury. Reynolds v. State, supra. * * *

Affirmed.[3]

[3] See Holmes v. State, 133 Miss. 610, 98 So. 104 (1923). Where a child commits a crime in the presence of his parent, there is no presumption of coercion by the parent, but immaturity and actual coercion may be shown. Kelley v. State, 79 Fla. 182, 83 So. 909, 16 A. L. R. 1465 (1920).

PART 3

HUSBAND AND WIFE

CHAPTER 1

PROPERTY AND CONTRACTS OF MARRIED WOMEN

SECTION 1.—HISTORICAL DEVELOPMENT [1]

The law relating to the capacity of a married woman to own and control property and to contract has been almost completely remade since the beginning of the development of American law. This remaking has been accomplished by both legislation and judicial decision. The development of the present law of this subject has been a most interesting process, but the process has so definitely reached its conclusion, in so large a majority of American jurisdictions, that it has become, for all except a few states, a matter of historic interest only. For that reason the editor has condensed into a brief statement the material relating to these questions.

The common law imposed no disabilities whatever upon a woman with reference to her property and contracts merely by reason of her sex. A single woman had exactly the same capacity to own property and to contract which a man had. It was only by reason of her status as a married woman, which status the law called "coverture," that her disabilities arose.

At common law the wife's personal property in her actual possession at the time of marriage, and any such property which came into her actual possession during her coverture, became by operation of law the absolute property of her husband.[2] This rule applied to all tangible chattels, such as money, furniture, or live stock. The wife was, however, entitled to her "paraphernalia," or bed, personal apparel, and ornaments, suitable to her station in life, after her husband's death, although even these, except her apparel, could be taken, if necessary, to pay his debts.[3] The wife's choses in action, i. e., debts or claims ow-

1 See Pollock and Maitland, History of English Law (2d Ed.) c. 7, § 2.

2 Jordan v. Jordan, 52 Me. 320 (1864); Caffey v. Kelly, 45 N. C. 48 (1852).

3 As to the wife's paraphernalia, see 2 Bl. Comm. p. 435 (1766); Masson Templier and Co. v. De Fries, [1909] 2 K. B. (C. A.) 831; Howard v. Menifee, 5 Ark. 668 (1844).

ing to her for breaches of contract or for damages for wrongs done to her person or property, became the property of the husband if he reduced them to possession during the coverture, but, if he did not so reduce them into possession, they remained the property of the wife. Hence if the husband died before the wife without having reduced such a chose in action to possession, it was still her property, and she, having by her husband's death recovered her legal capacity, could collect the claim for her own benefit.[4]

The question of what, other than actual collection by the husband, constituted a reduction to possession, was troublesome. A judgment in the name of the husband, or a novation, creating a new obligation running directly to the husband, such as a transfer of the wife's stock in a corporation to his name on the stock book, was a reduction to possession. A release or assignment by the husband of the claim, for a consideration, was a reduction to possession. If the wife's interest was in the nature of a reversion or remainder in chattels, the husband could not transfer it nor release it so as to bar the wife of her right to the chattels if she survived the husband, and the preceding estate in the chattels did not expire until after his death.[5]

The rule requiring reduction to possession in order to perfect the husband's title, applied also to her chattels real; i. e., her leasehold interests in land. Merely managing them, or collecting rents, or improving them by building upon them, was not a reduction to possession. "An actual disposition by sale, lease, or mortgage has always been required to take away the wife's right by survivorship. A mortgage or sale of part, or a lease of part, or for a less term, only bars the wife pro tanto; her right of survivorship remains in the equity of redemption and the residue of the premises or term." [6]

If the husband survived the wife, he became entitled, as administrator, but for his own benefit, to all of her personal property of every nature which had not already passed to him under the principles already discussed. Choses in action and chattels real, though not reduced to possession during the coverture, passed to him under this rule, and remained a part of his estate, though he died before he reduced them to possession.[7]

A wife's freehold interests in land did not completely vest in her husband, but he did acquire, jure mariti, an estate during the period of the coverture; that is, during their joint lives. This estate entitled him to the possession and control of the land and the receipt of the profits, and he could convey this estate to a third person.[8] If a child

[4] Boozer v. Addison, 2 Rich. Eq. (S. C.) 273, 46 Am. Dec. 43 (1846).

[5] For an exhaustive discussion of the power of the husband over the wife's choses in action, see 9 Am. Law Reg. 193, 385 (1860–61).

[6] Riley's Adm'r v. Riley, 19 N. J. Eq. 229 (1868).

[7] Judge of Probate v. Chamberlain, 3 N. H. 129 (1824).

[8] Robertson v. Norris, 11 Q. B. 916 (1848).

was born of the marriage, the husband became entitled to an estate by the curtesy initiate, which gave him the right, if he survived his wife, to an estate in her inheritable lands for the rest of his life. If the wife survived the husband, she was entitled to dower in his inheritable lands, which was a life estate in one-third of them.[9]

At common law, then, marriage gave to the husband all of his wife's tangible chattels, gave him the power of acquiring her choses in action by reducing them to possession, and gave him all the use and income of her lands during the marriage. It also gave him her earnings, as will be seen hereinafter.

The married woman had, at common law, no capacity whatever to contract. Her legal personality was so completely merged in that of her husband, and she was so completely deprived of all property rights, that her attempted contracts were wholly void. No liability whatever, even upon the theory of an implied contract to pay for benefits actually received, could be imposed upon her.[10] Her promise, during coverture, was not even a sufficient foundation for a new promise made after the coverture was ended.[11] Even where the husband had deserted the wife, she was held to have no contractual capacity.[12] Only if the husband was exiled, banished for life, had adjured the realm, or was an alien who had never resided within the realm, could the wife contract as a feme sole.[13] Upon contractual liabilities of the wife incurred before the marriage, the husband became liable jointly with the wife, if judgment was recovered against them within her lifetime.[14]

The extreme harshness of the rules of the common law with reference to a wife's property, caused the development, in courts of equity, of the doctrine that a married woman might, under certain circumstances, have equitable interests in property, which interests would be entirely free from the use and control of her husband. If property was conveyed to trustees for the benefit of a married woman, with some expression such as "for her sole and separate use" or "free from the control of her husband," equity would enforce the expressed intent of the grantor. Even though the conveyance was made directly to the married woman, equity would constitute her husband trustee

9 The subjects of curtesy and dower are fully treated in Aigler's Cases on Titles, in this series of casebooks. The subject of the wife's share in the chattels of her husband after his death, and of her right to administration of his personal estate, is treated in Costigan's Cases on Wills and Administration, also in this series.

10 Lee v. Lanahan, 59 Me. 479 (1871).

11 Lloyd v. Lee, 1 Strange, 94 (1718). The Pennsylvania cases are contra. See 17 A. L. R. 1341, 1349.

12 Robinson v. Reynolds, 1 Aikens (Vt.) 174, 15 Am. Dec. 673 (1826). See, contra, however, Anderson v. Jacobson, 66 Ill. 522 (1873); Gregory v. Pierce, 4 Metc. (Mass.) 478 (1840).

13 See Robinson v. Reynolds, 1 Aikens (Vt.) 174, 15 Am. Dec. 673 (1826), supra, note 12.

14 Lamb v. Belden, 1 Ark. 539 (1855); Gray v. Thacker, 4 Ala. 136 (1842).

for her and thus protect her equitable interest.[15] This device was commonly used by the well-to-do class. Equity also developed a doctrine that if a husband, in seeking to enforce a right or claim of his wife, was obliged to resort to a court of equity, the court would grant relief to the husband upon condition that he make a settlement upon his wife of an equitable proportion of the property recovered. The amount of this settlement was in the discretion of the court, and might, in a proper case, include all of the property recovered. This doctrine was later expanded to permit the wife or her trustee to originate a suit to assert her "equity to a settlement," even though the husband made no move to enforce his claim.[16]

The fact that a married woman held property "for her separate use" or "free from the control of her husband" would not exclude her husband's rights in her land as tenant by the curtesy, nor in her personal property as administrator, but he could be excluded from even these rights by words showing a specific intent to do so.[17]

Courts of equity regarded a married woman as a feme sole with reference to her "separate estate in equity," and hence she could convey it or incumber it or deal with it in any way as an ordinary owner could, and such dealing would be recognized in equity.[18] Out of her capacity to convey and incumber her equitable separate estate, there developed a considerable contractual capacity. If a married woman mortgaged her equitable separate property to secure a debt, although, as we have seen, the debt was not binding at law, yet the conveyance by mortgage was good in equity, and equity would enforce the charge against the property mortgaged. Thus equity recognized the debt as something more than a nullity, though it did not recognize it as creating any personal liability whatever against the married woman. Such a charge could be made only upon property owned at the time it was made, and property acquired by her thereafter, even to her separate use, would not be liable.

From this logical beginning, it was later held that a married woman could, by a contract, as well as by a conveyance, charge her equitable separate estate. The steps in the development of this doctrine are described in a leading English case.[19] The courts, instead of insisting upon a specific conveyance of, or charge upon, the property, came to regard the intention as sufficient, and, if satisfied that the married woman intended to make her separate property liable, they held that she had so charged it, even without any conveyance, formal or informal. Next the English courts held that, if a married woman did an act such as

15 Dicey, Law and Opinion in England, p. 373; Perkins v. Elliott, 23 N. J. Eq. 526 (1872).

16 3 Pomeroy's Equity Jurisprudence (4th Ed.) § 1114ff.

17 See Cooney v. Woodburn, 33 Md. 320 (1870).

18 See the opinion of Spencer, C. J., in Jacques v. Trustees of Methodist Episcopal Church in New York, 17 Johns. (N. Y.) 548, at 578, 8 Am. Dec. 447 (1820).

19 Murray v. Barlee, 3 Myl. & K. 209 (1834).

executing a bond or note, which would be completely void and nugatory unless it amounted to a charge upon her equitable separate estate, the court would conclude that she intended to charge her estate, rather than that she intended to do a useless thing. There was, for a time, some doubt as to whether an unwritten contract could be enforced against a married woman's separate estate upon this theory, but this question was finally decided in the affirmative.

By this gradual process, English courts of equity gave effect to the contracts of married women, to the extent of enforcing performance against their equitable separate estates, but without any personal liability. Legal estates in property, and equitable estates not held for the separate use of a married woman, were not made liable. It was possible to so settle property to a married woman's separate use that she could neither convey nor charge it, nor make it liable for her contracts, nor anticipate the income of it. In some American states, the rule was adopted that the creation of a "separate use" for a married woman ipso facto imposed these restraints upon it, and that, unless there were express powers conferred upon her, she had only the use or income of the property.[20] This was a notable exception to the general rules forbidding restraints upon the alienation of property, and was strictly limited to the property of married women. Property so settled could not, of course, be made liable for a married woman's contracts upon any theory, since she had no power whatever to incumber or charge it.

Some American jurisdictions refused to follow the English courts of equity to the point of implying a charge from the mere fact that a married woman had made a contract which would be wholly unenforceable if such charge were not implied. In a leading American case,[21] the Court of Appeals of New York held that a married woman's separate estate in equity was not liable upon a note given for a debt of her husband; the note not indicating on its face an intent to charge her separate estate, and the transaction, of course, not relating to her separate estate. The court criticized the reasoning of the English cases and laid down the doctrine that a married woman could not charge her separate estate in equity except upon a contract made for the direct benefit of her separate estate, or upon a contract expressly showing an intent to create a charge upon it. Some American states adopted a still different view, and held that no contract whatever which did not relate to the separate estate could bind it, even though there was an expressed intention to bind it.[22] There were extant, then, three different views as to the effect of a married woman's contract.

Beginning about 1850, statutes were enacted in practically all of our

20 Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625 (1829); Nix v. Bradley, 6 Rich. Eq. (S. C.) 43 (1853). See, contra, Jacques v. Trustees of Methodist Episcopal Church, in New York, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447 (1820), supra, note 18.

21 Yale v. Dederer, 22 N. Y. 450, 78 Am. Dec. 216 (1860).

22 Perkins v. Elliott, 23 N. J. Eq. 526 (1872).

states, which gave to married women their property free from their husbands' common-law rights, with certain powers of management, control, and disposition which varied in the different states, but which usually include full power to dispose of chattels. As to lands, some statutes permitted the wife to convey as if sole, but others required the consent of the husband, to be evidenced by his joinder in the deed. This requirement was a survival of the English law by which a married woman could convey her lands, other than those held to her separate use, only by a fine or common recovery, in which it was necessary that the husband join in order to divest his marital estate and prevent him from avoiding the conveyance, but the interests of the wife being safeguarded by the supervision of the court. From this background, the custom developed in this country, even without legislative sanction, of wives conveying by deed in which their husbands joined,[23] and this practice was embodied in the statutes, many of which required an acknowledgment by the wife, "privily" and apart from the husband, that she was not acting under compulsion in making the conveyance.[24] Later statutes have abolished the necessity of the husband's joining in the wife's conveyances of land, in most of the states.[25] Of course, if the husband has some right, such as statutory dower or homestead, in the wife's land, such right is not barred by a conveyance, in which he does not join, but, subject to such right, her conveyance passes her title to the land. In practically all the states a married woman can now make a valid will disposing of her property. Under the English Statute of Wills, and according to the earlier American decisions, she could not devise lands by will at all, and could only bequeath chattels with the consent of her husband.[26]

Under the statutes giving a married woman control over her property, it becomes necessary to determine whether the restraints which could formerly be attached to a married woman's "separate estate in equity" can still be so attached, or whether the removal of the common-law disabilities of coverture with reference to property, remove the right to impose restrictions upon the alienation of such property which could not be imposed upon the property of other owners. Some American courts have taken the view that the reason for allowing exceptional restraints upon a married woman's power to deal with her property, viz. her lack of business judgment or the likelihood that by reason of affection, persuasion, or compulsion she may give the property to her husband, still holds, and that therefore property may still be settled

[23] Manchester v. Hough, 5 Mason, 67, Fed. Cas. No. 9005 (1828).

[24] Manchester v. Hough, 5 Mason, 67, Fed. Cas. No. 9005 (1828), supra, note 23.

[25] Local statutes should be consulted as to whether, or when, the requirement of the husband's joinder in the wife's deed was removed. Some of the questions which arise in connection with the requirement are treated hereinafter, p. 349ff.

[26] Marston v. Norton, 5 N. H. 205 (1830).

to a married woman's separate use subject to the same restraints as before the statutes.[27] In many jurisdictions the question has not been passed upon.

In many of the American states, the common-law disability of a married woman to contract has been removed by statute, and she has been expressly given the same capacity as a single woman or a man, in that regard, except that some such statutes expressly deny her capacity to contract as surety or accommodation indorser, or in some other designated situation. Cases in which these exceptions have been interpreted will be printed hereinafter.[28] In other states the statutes are not so clear. They provide that a married woman "may contract with reference to her separate property," or "may bind her own separate property by contract." Under such statutes the rules with reference to the married woman's separate estate in equity and her contracts concerning it may obviously have some bearing. Such statutes refer to all of a married woman's property, since it has all been made her separate property by other portions of the statutes. These questions then arise: Does her contract create a personal liability, upon which such a personal action as assumpsit may be brought, or only a charge upon the property which must be foreclosed by some proceeding against the property, as was the rule in equity?[29] Does the contract bind only such property as the married woman owned at the time of the contract, as was the rule in equity? If assumpsit or some other personal action can be maintained, and if the last question be answered in the affirmative, should the judgment be expressly limited to such property, and, if the judgment may be general, must the execution of such judgment be limited to such property?[30] Will any contract bind the property on the theory of an implied charge, as in the English court of equity, or must there be an express intent to charge the property, or some relation between the contract and the property as some American courts of equity required?[31] Shall there be any difference in this regard be-

[27] Holliday v. Hively, 198 Pa. 335, 47 A. 988 (1901); Travis v. Sitz, 135 Tenn. 156, 185 S. W. 1075, L. R. A. 1917A, 671 (1916). Contra: Cropper v. Bowles, 150 Ky. 393, 150 S. W. 380 (1912).

[28] Infra, pp. 334–344.

[29] See Todd v. Lee, 15 Wis. 365, 1 Am. L. Reg. (N. S.) 657 (1862), and note. But see, Cookson v. Toole, 59 Ill. 515 (1871); Campbell v. White, 22 Mich. 178 (1871); Duty v. Sprinkle, 64 W. Va. 39, 60 S. E. 882 (1908); Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917 (1895); Marinack v. Blackburn, 93 W. Va. 585, 116 S. E. 7 (1923).

[30] Giltner State Bank v. Talisch (Neb.) 212 N. W. 536 (1927), holding that, while the judgment in an action against a married woman upon her contract is general, execution may not be levied upon property not owned by her at the time the contract was made.

[31] In Schultz v. Pomplon's Estate, 227 Mich. 304, 198 N. W. 916, 36 A. L. R. 387 (1924), and Monroe State Sav. Bank v. Orloff, 232 Mich. 486, 205 N. W. 596 (1925), it is held that the contract must relate to the married woman's separate estate.

See, also, Timberlake v. Semple, 86 Fla. 314, 97 So. 718 (1923); Ness v. Coffer, 42 Idaho, 78, 244 P. 145 (1926); First National Bank of Pocatello v. Pol-

tween a written contract and an oral one, as there was at one time in England? Is a promise to pay for property purchased by a married woman a contract relating to her separate estate?[32] These various difficulties have caused the courts of some of the states which have such statutes to reach the conclusion that the married woman is personally liable, and that any of her property, whether owned at the time of the contract or not, may be taken in execution upon a judgment recovered on such a contract. There is no uniformity whatever among the states which have not reached this conclusion, and no useful end would be served by discussing their various rules.[33] All that can be said is that in a few of the states there are survivals of the learning with reference to a married woman's power to bind her separate estate in equity which now affect her power to contract under the statutes. It should also be remembered that in some states valid restraints may be placed upon a married woman's capacity to deal with property, in the instrument by which such property is conveyed to her.[34] In that case, of course, such property cannot be taken in satisfaction of a judgment or decree, even though the owner of the property otherwise has full capacity to contract.

SECTION 2.—UNDER MODERN STATUTES

NEWHALL v. ARNETT.

Supreme Court of Pennsylvania, 1924. 279 Pa. 317, 123 A. 819.

Suit by C. Stevenson Newhall, assignee of Edward B. Mason, and another, copartners trading as Arnett & Co., against Elizabeth H. Arnett. Judgment for defendant, and plaintiff appeals. Affirmed.

WALLING, J. During and for some years prior to 1919 William W. Arnett, Edward B. Mason, and Charles C. Rianhard conducted a brokerage business in Philadelphia as partners under the firm name of "Arnett & Co." At the close of that year they entered into a written

ing, 42 Idaho, 636, 248 P. 19 (1926); First Sav. Bank & Trust Co. v. Flournoy, 24 N. M. 256, 171 P. 793 (1917).

In Biltwell Tire & Battery Co. v. Book, 112 Neb. 647, 200 N. W. 868 (1924), it was held that an express written intent to charge the property was sufficient, though the contract was one of suretyship on her husband's note.

See Hershizer v. Florence, 39 Ohio St. 516, 23 Am. L. Reg. (N. S.) 315, and note (1883). In the case, it was held that a written contract having no relation to the married woman's separate estate, and expressing no intent to charge it, would charge it upon the theory of the English decisions hereinbefore discussed.

[32] See Monroe State Bank v. Orloff, 232 Mich. 486, 205 N. W. 596 (1925); Seaver v. Lang, 92 Vt. 501, 104 A. 877 (1918).

[33] See, e. g., the cases cited in notes 30 and 31, supra.

[34] See note 27, supra, p. 333, and the text relating thereto.

contract of dissolution, herein called "the agreement," by which Arnett retired, owing the firm $9,000. The agreement provided, inter alia, that Arnett's wife, the defendant here, should give her note for the $9,000, which, although not a party to the agreement, she did in form as follows:

"$9,000. Philadelphia, January 2nd, 1920.

"Two years after date I promise to pay to the order of Arnett & Co. nine thousand dollars. With interest at 6% payable semiannually, without defalcation. Value received.

"Elizabeth H. Arnett."

In answer to this suit, brought on the note by the firm's assignee, Mrs. Arnett contended she was an accommodation maker thereof for her husband, and hence not liable. The trial judge sustained this contention, and directed a verdict for the defendant; from judgment entered thereon, plaintiff has appealed. The case turned on the construction of the agreement, and was rightly decided by the trial court. The wife had no interest in the firm, and owed it nothing, as the $9,000 was an existing debt of the husband, and for such the statute does not permit a married woman to obligate herself. See Oswald v. Jones, 254 Pa. 32, 98 A. 784; Patrick & Co. v. Smith, 165 Pa. 526, 30 A. 1044, and other cases. The law looks at the substance, not the form, of the transaction. Sibley v. Robertson, 212 Pa. 24, 61 A. 426; Kemper v. Richardson, 72 Pa. Super. Ct. 115; Patrick & Co. v. Smith, supra. The mere fact that Mrs. Arnett was maker rather than indorser of the note is of no moment. The statute says:

"She [a married woman] may not become accommodation indorser, maker, guarantor or surety for another." Section 2, Act of June 8, 1893 (P. L. 344; Pa. St. 1920, § 14570).

Hence she is as incapable of becoming an accommodation maker as an accommodation indorser. There was a provision in the agreement that Mr. Mason's son should loan the money to Mr. Arnett and accept Mrs. Arnett's obligation for the same; that would have been a manifest case of accommodation maker, but apparently was not consummated; at least the note was given to the firm as provided in another paragraph of the agreement.

Appellant's contention that the note operated as payment of the husband's debt is untenable. A debt is not paid by the giving of a note therefor, whether it is that of the debtor or of a third party, unless there is a stipulation that such shall be its effect. Dougherty & Co. v. Bash, 167 Pa. 429, 31 A. 729; McCarthey v. Kipp, 171 Pa. 644, 33 A. 233; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Mechanics' Nat. Bank v. Kielkoof, 22 Pa. Super. Ct. 128. Here the contrary appears, as the agreement stipulates for "payment by Mrs. Arnett or Mr. Arnett"; also for a return of Arnett's seat in the Philadelphia Stock Exchange, "at any time after payment of his obligations, hereby assumed by Mrs. Arnett"; but says nothing about releasing him from the indebtedness,

or of assigning the claim against him to her. We need not, therefore, decide as to the effect of such a release or assignment. The debt remained that of the husband, secured by the wife's note, and, so long as the latter was an executory obligation, it was open to the defense of coverture.

Of course, a wife may pay her husband's debts (Scott v. Bedell et ux., 269 Pa. 167, 112 A. 43) and may use borrowed money (Yeany, to Use of Gold S. Nat. Bank, v. Shannon, 256 Pa. 137, 100 A. 527) or pledge her property (Kuhn v. Ogilvie, 178 Pa. 303, 35 A. 957; Kulp v. Brant, 162 Pa. 222, 29 A. 729; Dusenberry v. Mutual L. Ins. Co. of N. Y., 188 Pa. 454, 41 A. 736; Herr v. Reinoehl, 209 Pa. 483, 58 A. 862; Bartholomew v. Allentown Nat. Bank, 260 Pa. 509, 103 A. 954) for that purpose. A mere agreement to pay his debt, however, is not payment, nor enforceable against her. In the language of the trial court:

"Her note being without consideration to her, and an assumption of the debt of another who remained primarily liable, had all the characteristics of an 'accommodation' note of which she was the 'maker,' and which she had no power under the statute to make."

The judgment is affirmed.

VEAL v. HURT.

Supreme Court of Georgia, 1879. 63 Ga. 728.

To the report contained in the opinion, it is only necessary to add that, after verdict for defendant, plaintiff moved for a new trial on the following, among other grounds:

(1) Because the court erred in charging the jury as follows: "If you believe from the evidence that defendant's husband had previously contracted for or contemplated the purchase of a photograph car on his own account for the sum of $300.00, and the plaintiff had notice of this, and after such notice let defendant have said sum of money for the purpose of paying for said car, and took from defendant's husband his wife's note and mortgage therefor, upon that state of facts the plaintiff is not entitled to a verdict in his favor."

(2) Because the court erred in the following charge to the jury: "Plaintiff's counsel maintain that, although the contract of purchase may have been made by the husband, yet, when the money borrowed by the wife paid for it, it became her separate property, and therefore, in effect, the money was borrowed by her to purchase property for herself. Upon this point, I charge you that, to have this position avail the plaintiff, you must be satisfied from the evidence that the wife knew when she gave her note and mortgage that the money was borrowed on, that the proceeds were to be used in the purchase of a photograph car for herself, and that the title, on the payment of the money, would pass to her and become a part of her separate estate. If you believe from the evidence that the husband made the contract of purchase and

the plaintiff had the notice, as I have already told you, then that casts the onus upon the plaintiff to prove to your satisfaction that the title to the car when purchased went to the wife, and that this was her understanding when she signed the note and mortgage. If such has been proven to your satisfaction from the evidence, then the plaintiff would be entitled to recover, otherwise not."

The motion was overruled, and plaintiff excepted.

JACKSON, Justice. The facts make the following case: The husband tried to borrow money from the plaintiff to pay for a car to take photographic pictures, which he had contracted for, and for which he was to pay $300.00, the amount he desired to borrow. He was refused. He then proposed to bring the lender a note for that sum signed by the wife as borrower, and secured by a power of attorney from the wife to the lender to sell her real estate in Atlanta, and pay the note if not paid. The note was to bear interest at 33 per cent. per annum. This was agreed, and the contract was consummated. One hundred and twenty-five dollars was paid and credited on the note, and suit was brought for the balance. It was defended by the wife on the ground that it was the assumption of the debt of her husband, and a contract of suretyship to bind her separate estate to pay his debt.

1. If the husband owed a debt which he was bound to pay, then the money was loaned to enable her to assume his debt, if the lender had knowledge thereof. Did he owe a debt? He had contracted for the car and owed $300.00 therefor. Therefore he owed for a car, and was bound to pay therefor when it was delivered. Did the lender know it? He knew all about it. The car was not for the wife. Nothing was said about the title thereto being put in her, but the money was loaned to enable the husband to pay for it for his own venture. In other words, it was loaned virtually that the wife might assume the debt of her husband which he owed for this car he had contracted for, and therefore it is a contract absolutely void under section 1783 of our Code, which declares that she cannot bind her separate estate "by any assumption of the debts of her husband." The wife was never present with the lender. No contract of any sort was made with her in person by him; the husband managed the whole affair, and induced her to go into the arrangement by assuring her that she would never have to pay a cent, for he would make enough to settle it all.

2. The contract, too, bound the separate estate of the wife as security for the debt. She gave the lender a power of attorney to sell her town property and pay the debt therewith, with obligation to turn over the balance to her. If the debt was the husband's, if the car was his, if it was for his venture, and not her property or for her use, then there was a naked effort to bind her separate estate as security to get the money for her husband in order to pay his debt. The same section of our Code also declares that "she cannot bind her separate estate by any contract of suretyship," and that "any sale of her separate

estate made to a creditor of her husband in extinguishment of his debts, shall be absolutely void." While this was not exactly a sale to a creditor of her husband, yet it was a power to a lender of money to the wife for the husband, to sell her separate estate in order to pay for a venture of his, and is equally repugnant to the spirit and reason of the statute.

It seems to us that the contract is obnoxious to the provisions of the statute in both views of it, as an assumption debt of the husband, and as an attempt to bind her separate property to pay it.

It matters not, therefore, what may have been the irregularities of the trial; as the verdict is right on the facts, and could not in law be otherwise, the judgment is affirmed. * * *

Judgment affirmed.

IONA SAVINGS BANK v. BOYNTON.

Supreme Court of New Hampshire, 1897. 69 N. H. 77, 39 Atl. 522.

Assumpsit on the promissory note of the defendant, a married woman. Facts found by the court. The note was signed by her at the request of her husband, who told her he needed the money. She signed the note to help her husband in his business, and authorized him to secure its discount and dispose of the proceeds. The defendant's husband applied to the plaintiffs for a loan of $5,000, with 60 shares of the capital stock of the Tilton Hosiery Company as collateral. They declined to make the loan, but told him that if his wife desired to borrow that amount with the same security, the loan would be made. Shortly afterward he brought to the bank the note in suit, with the collateral above named, and received the amount of the plaintiff. He deposited the avails in the Citizens' National Bank to the credit of the Tilton Hosiery Company, of which he was treasurer. The defendant never met or had any talk with any officer of the bank relative to the loan. Upon the foregoing facts the court found a verdict for the plaintiffs for the amount due on the note, and the defendant excepted.[35]

WALLACE, J. The case discloses that the plaintiffs refused to make the loan to the husband, but did make it to the wife alone upon a

[35] The statute in force in New Hampshire at this time appears in Pub. St. 1891, c. 176, § 2. It is as follows: "Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities in relation to property held by her in her own right, as if she were unmarried, and may make contracts, and sue and be sued, in all matters in law and equity, and upon any contract by her made, or for any wrong by her done, as if she were unmarried: Provided, however, that the authority hereby given to make contracts shall not affect the laws heretofore in force as to contracts between husband and wife; and provided, also, that no contract or conveyance by a married woman, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her, except a mortgage releasing her right of dower and homestead."

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note signed by her to which the husband was not a party, and that the hiring of the money by the defendant from the plaintiffs was the independent contract of the wife as principal and not as the surety or guarantor of the husband. The fact that she hired the money with the intention of letting her husband have it to assist him in his business, and did so let him have it, did not impair or suspend her legal capacity to make the contract, or make it an undertaking for him or in his behalf within the meaning of the statute. Parsons v. McLane, 64 N. H. 478, 13 Atl. 588; Jones v. Holt, 64 N. H. 546, 15 Atl. 214; Wells v. Foster, 64 N. H. 585, 15 Atl. 216. Exception overruled.[36]

PARSONS, J., did not sit. The others concurred.

SCOTT v. BEDELL et ux.

Appeal of BEDELL.

Supreme Court of Pennsylvania, 1920. 269 Pa. 167, 112 A. 43.

Proceeding on a judgment note by Fred W. Scott against Milton Bedell and wife. From an order discharging a rule to open the judgment, Anna Bedell, administratrix, appeals. Appeal dismissed.

MOSCHZISKER, J. On January 25, 1916, Margaret C. Bedell and Milton Bedell, her husband, executed a judgment note to Fred W. Scott, upon which judgment was duly entered in the court below. After making certain payments on the debt, Margaret C. Bedell entered a rule to open the judgment; subsequently she died. Anna Bedell, the decedent's daughter, suggested of record the death of her mother, and that letters of administration had been granted to herself. The court below discharged the rule to open the judgment, and Anna Bedell, administratrix, filed this appeal.

The issue on the rule raised the question whether the note in suit was an original undertaking of Margaret C. Bedell or was signed by her as surety. Plaintiff averred and contended that Mrs. Bedell "personally borrowed the money," admitting that it was "for the purpose of purchasing, or enabling her husband to purchase, a saloon"; and the court below, from the evidence in the case, found as a fact that "Mrs. Bedell signed the note as borrower, and not as surety" for her husband.

We have read the testimony and are not convinced that the court below erred in its finding. In Yeany v. Shannon, 256 Pa. 135, 138, 100 A. 527, 528, this court recently said:

"While she [a married woman] may not become surety for her husband, there is no law to prevent her paying his debts, or giving him money to use in his business, even though she may have borrowed it."

[36] Accord: Garrett v. Thornton, 157 Ga. 487, 121 S. E. 820 (1924); Rogers v. Shewmaker, 27 Ind. App. 631, 60 N. E. 462, 87 Am. St. Rep. 274 (1901). See Burn's Ann. St. of Indiana 1926, § 8738, giving a married woman capacity to contract as surety.

The authorities on the subject in hand are there referred to and need not be gone over again.

Oswald v. Jones, 254 Pa. 32, 98 A. 784, relied upon by appellant, is plainly distinguishable on its facts from the case now before us. There the court below found that the person who loaned the money and the married woman, who gave the note, "were at no time face to face with each other in the whole transaction"; whereas, here the evidence shows that Mrs. Bedell, herself, was active in obtaining the loan. Again, in that case, the trial court found as a fact that the husband was the real borrower, while in this case the opposite fact is found, on ample evidence.

The assignments of error are overruled, and the appeal is dismissed.

CITY NAT. BANK OF HACKENSACK v. DI NAPOLI.

Court of Chancery of New Jersey, 1927. 138 A. 107.

Suit by the City National Bank of Hackensack against Antonetti Di Napoli. Decree for complainant advised.

LEWIS, Vice Chancellor. This is a bill to foreclose a mortgage on property standing in the name of Antonetti Di Napoli, widow of Gaetano Di Napoli, which was executed by both of these parties some time prior to the death of the husband. The wife testified that her husband's money had gone into the property and not hers. Apparently the husband had it put in the wife's name, although he advanced the money necessary to obtain the property. All the money secured on the mortgage under foreclosure went to the account of Di Napoli & Son, the firm consisting of Gaetano Di Napoli, the defendant's husband, and their son James. The firm used the money in their business, with the exception of a certain amount which was used to pay off another mortgage on the property. The widow now contends that she received no benefit from the mortgage, and that she did not realize what the nature of the transaction was when she made it. She seeks to avoid the foreclosure on the ground that it comes within the protection of the "Married Women's Act" (3 Comp. St. 1910, p. 3238, § 15), relieving her from liability for the debts or obligations of the husband, where her personal estate received no benefit.

The authorities seem to be clear that a married woman may pay the debt of her husband, or mortgage her property for the purpose of canceling his indebtedness; that is a completed executed transaction, and the wife is bound by it. It is different from where she merely undertakes to become a surety for the performance of an executory obligation. It would seem, therefore, that the present defendant has no valid defense to the foreclosure of the mortgage. The defense does not show that any actual fraud was practiced upon her, or coercion, at the time of the making of the mortgage. The official who took her acknowl-

edgment, and another witness, testified very clearly that the whole transaction was explained to her at the time her acknowledgment was taken (which was separate and apart from her husband), and that she thoroughly understood the situation at the time.

The foreclosure should therefore be granted, and I will advise a decree accordingly.[37]

FARMINGTON NAT. BANK v. BUZZELL.

Supreme Court of New Hampshire, 1880. 60 N. H. 189.

Assumpsit, upon two joint and several promissory notes, made in 1878, signed by the defendants, and payable to the plaintiffs or order. The name of Josie M. F. Buzzell was first upon the notes. Samuel H. Buzzell and Jacob P. Buzzell were defaulted. Josie M. F. Buzzell pleaded that at the time of making the promises she was and still is the wife of said Samuel H. Buzzell, and that the promises were made as surety for her husband; and upon the trial the issue was, whether the defendant, Josie M. F. Buzzell, signed the notes as surety, or in behalf of her husband, or as principal.

The notes being produced in evidence, and the name of Mrs. B. appearing as principal and first upon them, the plaintiffs' counsel contended that she was estopped from showing that she signed the notes as surety for her husband, or that her promises were an undertaking in his behalf; but the court ruled otherwise, and allowed her to introduce evidence tending to show that she was in fact surety only upon the notes; and the plaintiffs excepted. The plaintiffs requested the court to instruct the jury that if the notes in suit were presented to the bank by Mrs. B., or her agent, bearing her name as principal, and were accepted by the bank with the understanding that she was principal, she is to be holden as principal unless it was made known to the bank that the contract was really one of suretyship, or for or on account of the husband. The court declined to give these instructions, and instructed the jury that if the notes were in fact executed by her as surety, or for and on account of her husband, she is not liable, although the plaintiffs did not know these facts, but understood and believed when the notes were discounted that Mrs. B. signed them as principal; and the plaintiffs excepted. The jury returned a verdict for the defendants, which the plaintiffs moved to set aside.

[37] Accord: Kuhn v. Ogilvie, 178 Pa. 303, 35 A. 957 (1896).

In Royal v. Sutherland, 168 N. C. 405, 84 S. E. 708, Ann. Cas. 1917B, 623 (1915), it was held that the following provision in the state Constitution: "Real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband"—merely protected the wife's property against her husband's common-law rights, and did not prevent her from becoming liable as a surety for him.

FOSTER, J. The question presented by the case is, Can a wife bind herself as a surety for her husband? It is conceded that at common law she could not, acting for herself, enter into such a contract. But the common law disability of married women, as judicially interpreted in a former state of society, has been essentially modified by the development of a later and different state of society; and their rights have been enlarged and defined both by adjudication and legislation. In this case it is attempted to hold Mrs. Buzzell personally liable as the surety of her husband on the notes in suit. Whether she received and used the money represented by the notes, is a question which is immaterial in our present inquiry. Messer v. Smyth, 58 N. H. 298; Yale v. Wheelock, 109 Mass. 502; Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Bartlett v. Bailey, 59 N. H. 408.

The General Laws (c. 183, § 12) provide that a married woman "may make contracts, and sue and be sued in all matters in law and equity, and upon any contract by her made * * * as if she were unmarried; * * * provided that no contract or conveyance by a married woman of property held by her in her own right as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf, shall be binding on her." This statute, it is claimed, gives her capacity to make the contract of suretyship for her husband, because it gives her capacity to make other contracts, and that, being qualified to make the contract, she may be estopped to claim the protection of the statute. This reasoning is based on the assumption that all her common-law disabilities as to contracts are removed. But it was evidently the legislative intention to leave her, in cases like the present one, subject to the protection of the common law. The proviso in the statute is, in effect, a re-enactment of the common-law disability of a married woman to be a surety for her husband. Major v. Holmes, 124 Mass. 108.

As Mrs. Buzzell did not possess the legal capacity to make this contract, the plaintiffs, however innocent, cannot enforce it against her. 1 Pars. Notes and Bills, 276, 277; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. Concealment, fraud, or falsehood as to her relation to the contract, cannot confer capacity on her so as to entitle the plaintiffs to an action against her on the contract. Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448. For false representations and fraud a party may be subjected to punishment and to damages in a proper form of action, and legal incapacity to make a contract would not necessarily be a bar to the action. Fitts v. Hall, 9 N. H. 441. At common law a married woman is not estopped by her covenants, and she cannot by her own act enlarge her capacity to bind her separate estate. Palmer v. Cross, 1 Smedes & M. (Miss.) 48; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378. Her disqualification as a party to a contract prevents the application of an estoppel; otherwise it could be said that though she cannot make a contract because of her incapacity, when she attempts to make one by

fraud or misrepresentation, legal ability, is in some way conferred by estoppel; that is, she is not qualified to make a contract for herself, but is liable on one that she unsuccessfully tries to make. Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Lowell v. Daniels, 2 Gray (Mass.) 161, 169, 61 Am. Dec. 448; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146. In cases of torts she may be estopped to deny that her representations are true; but in such cases her legal incapacity to bind herself by contract is not denied or qualified, and is not material as a ground of defence. Big. Est. 488, 490; Liverpool Adelphia Loan Association v. Fairhurst, 9 Ex. 422.

Although the acceptor of a bill or the maker of a note is estopped to say that the drawer and payee, or indorser, is an infant or a married woman, it does not follow that the infant or the married woman would be estopped to plead their incapacity. The maker of a negotiable note warrants that the payee has authority and capacity to transfer the title by indorsement; and if the payee happens to be a married woman, he makes the same warranty as to her capacity; but her disability to make a contract is not his disability to make the warranty. Therefore, in an action on the note, while he would be bound by his warranty of her capacity to make the indorsement, she would not be bound, because at common law she is not a competent party to the contract. Sto. Prom. Notes, § 87; Byles, Bills, 64; George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195; Drayton v. Dale, 2 B. & C. 293; Taylor v. Croker, 4 Esp. 187.

Judgment on the verdict.

CLARK, J., did not sit; the others concurred.[38]

MAJOR v. HOLMES.

Supreme Judicial Court of Massachusetts, 1878. 124 Mass. 108.

Three actions of contract upon promissory notes made by husband and wife after the St. of 1874, c. 184, took effect. The consideration of the note in each case was a debt of the husband to the payee, and not the money advanced or expended on the separate property of the

[38] Accord: Levering v. Shockey, 100 Ind. 558 (1884); Bishop v. Bourgeois, 58 N. J. 417, 43 A. 655 (1889).

In Barton Sav. Bank & Trust Co. v. Bickford, 97 Vt. 166, 122 A. 582 (1923), the court held, on facts similar to those of the principal case, that the Negotiable Instruments Act (G. L. § 3006 et seq.), the parol evidence rule, and the doctrine of estoppel prevented a defendant married woman from introducing evidence that, although she signed a note in form as a principal, she was in fact a surety.

See L. R. A. 1916C, 240, for an exhaustive note on the question of the estoppel of a married woman, showing a growing tendency to apply the doctrine of estoppel, as her legal capacity is enlarged by statute. See, also, Smith v. Weeks, 65 Vt. 566, 25 A. 197 (1892).

A married woman may be estopped by standing by and acquiescing in the conveyance of her property by another as his own. Pahmeyer v. Meyer (Tenn. Ch. App.) 53 S. W. 982 (1899).

wife. The first action was brought against the wife alone after the death of the husband. The second and third actions were brought against both husband and wife.

Each case was submitted upon the facts above stated to the Superior Court, which gave judgment for the plaintiff; and the defendants appealed.

GRAY, C. J. Before the St. of 1874, c. 184, the female defendant would not have been liable in either of these cases, because contracts could only be made by a married woman in reference to her separate property, business or earnings. Gen. St. c. 108, § 3; Williams v. Hayward, 117 Mass. 532; Nourse v. Henshaw, 123 Mass. 96.

But this statute has removed that restriction, and in the broadest terms enables a married woman to "make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole," and does not require that the consideration of her contracts should enure to her own benefit. The provision that nothing in this act shall authorize her "to convey property to, or make contracts with, her husband," [39] is evidently not intended to impose any new restriction on her capacity, but merely to affirm the rule of the common law, so far as her husband is the other party to her grant or contract; and does not prevent both of them from binding themselves by a joint promise to a third person, within the authority conferred by the statute. Parker v. Kane, 4 Allen, 346.

The female defendant in each of the cases before us is therefore liable to the plaintiff upon her contract with him, although, by reason of her incapacity to contract with or to sue her husband, no contract of indemnity could be made or implied as between them, as there might be in the case of two promisors capable of contracting with and suing each other. A contract of indemnity between principal and surety is no part of, and nowise affects their contract with the creditor. Penniman v. Vinton, 4 Mass. 276; Carpenter v. King, 9 Metc. 511, 43 Am. Dec. 405.

Judgments affirmed.[40]

[39] See Witherington v. Nickerson, 256 Mass. 351, 152 N. E. 707 (1926), for an application of this provision.

[40] But see Browne v. Bixby, 190 Mass. 69, 76 N. E. 454, 5 Ann. Cas. 642 (1906), and Ricker v. Ricker, 248 Mass. 549, 143 N. E. 539 (1924), holding that the equitable doctrines of reimbursement and exoneration may be invoked by the administrator of a married woman who was surety for her husband. The court said, in Browne v. Bixby, "The foundation of the suit is not a contract made by the husband with his wife, but the application of a familiar law of suretyship. * * *"

MAY v. MAY.

Supreme Court of Nebraska, 1879. 9 Neb. 16, 2 N. W. 221, 31 Am. Rep. 399.

This was an action brought by Hattie May in the district court for Richardson county upon two promissory notes executed by John May, the first for $1,000 to one Kooken, and by him assigned to the plaintiff, and the second for $728.81 directly to the plaintiff. Plaintiff and defendant were husband and wife, and the notes sued on were made and delivered and suit brought thereon while they occupied that relation. The defense set up in the answer was that said plaintiff, Hattie, was the wife of said defendant, John, and to this answer a demurrer was filed, and, upon argument before Weaver, J., overruled. Plaintiff excepted and brought the cause to this court by petition in error.

COBB, J. Although there is but one practical question presented by the record in this case, yet it will perhaps be found more convenient, for the purpose of its proper consideration, to divide it into two at the outset.

First. Does the making and delivery of a promissory note by a married man to his wife for a valuable consideration constitute a valid and binding contract?

Second. Can a married woman while living with her husband maintain an action against him on a promissory note made and delivered by him to her since the marriage?

It will be readily conceded that unless we find authority for an affirmative answer to these questions in our statutes they must both be answered in the negative. The sections of our statute applicable to the first branch of our inquiry are as follows:

"Section 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, or she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. [Laws 1875, p. 88.]

"Sec. 2. A married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on trade or business and perform any labor or service on her sole and separate account; and

the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." [Gen. St. p. 465, c. 41.]

This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may use the language) to her to "bargain, sell, and convey her real and personal property, and enter into any contract in reference to it," to "sue and be sued," to "carry on trade or business and perform any labor or service on her sole and separate account," and to use and invest her earnings in her own name, contracts with her husband are not excepted.

The provisions of the statute of Maine on this subject are as follows:

"Section 1. A married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance; except real estate conveyed to her as security or in payment of a bona fide debt actually due from her to her husband. When payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase.

"Sec. 2. A woman having property is not deprived of any part of it by her marriage, since the act approved March 22, 1844, was in force; and a husband by marriage, since that time, acquires no right to any property of his wife. * * * A married woman may release to her husband the right to control her property, or any part of it, and dispose of the income thereof for their mutual benefit, and may in writing revoke the same.

"Sec. 3. She may receive the wages of her personable labor, not performed for her own family, maintain action therefor in her own name, and hold them in her own right against her husband or any other person."

Rev. St. Me., 1871, p. 491.

Under this statute the case of Webster v. Webster, 58 Me. 139, 4 Am. Rep. 253, was commenced and decided. That was an action on a note made and delivered by the defendant to the plaintiff January 22, 1861 (the above statute being then in force), and they being then married (at the date of the note) and living together as husband and

wife. At the October Term, 1869, they were divorced a vinculo. Afterwards she brought the suit on the said note, and had judgment at the superior court. On error to the supreme court it was held, that while for purely technical reasons she could not have maintained the suit until after the divorce or the termination of the marriage relation in some other way, yet that the giving of the note created a valid contract between the parties, and that the defence of marriage (which was urged and relied upon by plaintiff in error) was purely technical. It continues only while that relation continues, and ceases with its termination. The judgment was affirmed.

The statute of Kansas in relation to the rights of married women is identical with our own. Under its provisions the supreme court of that state has held, in a case where a married woman living with her husband bought a horse from him and paid him for it out of her separate money—how or when acquired by her is not stated—which horse was soon afterwards levied upon by a constable by virtue of an execution against the husband, that she could maintain replevin against the constable for the horse. Thus necessarily holding that the husband and wife, while living together in that relation, were competent to make legal and binding contracts with each other, so as to pass the title of property ex vi termini. Going v. Orns, 8 Kan. 85, which case has been followed by later cases in that state.

In the state of Iowa, under a statute somewhat different from ours, though not different in principle, it was held in a case where, during the marriage relation, the husband borrowed money from his wife and gave her his note for it, that the same was a valid and binding contract, and that he being deceased she could maintain a suit thereon against his administrator. Logan v. Hall, 19 Iowa, 491.

As long ago as 1841 it was held by the supreme court of Ohio that a note given by a husband to his wife for a loan of money by her to him, out of a dower interest received by her from the estate of a former husband, created a legal obligation which—the maker of the note having deceased—would be enforced against his administrator. Huber v. Huber's Administrator, 10 Ohio, 371, which case was followed in 1857 in Wood v. Warden, 20 Ohio, 518.

In none of the above mentioned states has the legislature passed any act which in terms changes the common law in regard to the nature and character of the marriage relation or the unity of the persons of husband and wife, and the above cases must have gone upon the theory that the statutes of the said states respectively defining the rights of woman in the marriage relation in respect to the ownership, control, and disposition of property, have in effect done away with the technical unity of husband and wife as formerly existing at common law. At least, such is my opinion. So that when our statute says that "a married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same ex-

tent, and with like effect as a married man may," etc., it means that she may sell the same to, or contract with reference to the same with, anybody who is generally competent to contract and that the other contracting party will be bound by such contract regardless of whatever relations may exist between them.

I come, therefore, to the conclusion that the plaintiff in error was competent to receive the said note set forth in the first cause of action set out in the petition from the said Josiah Kooken, and the same constitutes a legal cause of action in her hands against the defendant in error. Also that the note made and delivered by the defendant in error to the plaintiff in error, as set forth in the second cause of action in the said petition, is a legal and binding contract between the parties.

[The court then held that the plaintiff in error could maintain the action against the defendant in error in the district court while they were living together as husband and wife.]

Reversed and remanded.[41]

41 Accord: Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027 (1906); Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956, (1890); Regal Realty & Investment Co. v. Gallagher (Mo. Sup.) 188 S. W. 151 (1916). In some states the question is expressly covered by statute.

See 11 A. L. R. 277, for a note on the validity of contracts between husband and wife for the purpose of preventing divorce, or as a basis for the resumption of marital relations.

In Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273 (1899), it was held that the wife could not sue her husband for interest due on a note from him to her executed after the marriage. The court said: "It (section 2213 of the Code of 1873) reads as follows: 'Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.' It is said that this section authorizes any kind of contracts between husband and wife. We do not think so. Both husband and wife were under such legal disabilities at common law as that they could not contract with each other. To remove the disability of one will not validate the contract, for one of the contracting parties has no assenting mind; and it would be strange doctrine to announce that, because the disability was removed from one of the contracting parties, the contract is good, although the other is without a contracting mind. The statute undoubtedly has reference to contracts with persons other than her husband."

In applying the Pennsylvania statute, it has been held that a wife cannot sue her husband upon a promissory note, Gillan v. West, 232 Pa. 74, 81 A. 128 (1911), but can take judgment upon a note upon his warrant of attorney to confess judgment, Harwood v. Harwood, 235 Pa. 532, 84 A. 426 (1912). The court in the latter case drew a distinction between an adverse proceeding and an amicable one.

To the effect that the contracts of a husband and wife with each other, though not enforceable at law, are enforceable in equity, see McKie v. McKie, 116 Ark. 68, 172 S. W. 891, L. R. A. 1915D, 1126 (1914); Dennison v. Dennison, 98 N. J. Eq. 230, 130 A. 463 (1925).

But see Gahm v. Gahm, 243 Mass. 374, 137 N. E. 876 (1922), holding that there must be some special equitable consideration, such as fraud, coercion, breach of trust, etc., and that equity will not enforce an ordinary money claim between husband and wife.

At common law, of course, the antenuptial liability of one spouse to the other was extinguished by marriage. If the husband owed the wife, his power to collect her choses in action for his own benefit caused this result, and, if the

HOWARTH v. WARMSER.

Supreme Court of Illinois, 1871. 58 Ill. 48.

[Action against husband and wife for the ante-nuptial contract of the wife. Judgment for the plaintiff against both. Appeal.]

Mr. Chief Justice LAWRENCE delivered the opinion of the Court:

We held, in Connor v. Berry, 46 Ill. 370, 95 Am. Rep. 417, and McMurtry v. Webster, 48 Ill. 123, that the husband was still, as at common law, liable for the debts of his wife, contracted before marriage, notwithstanding the act of 1861, because that act still left to the husband the wife's earnings. Since those decisions were made, the legislature, by the act of 1869, has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has virtually abolished it, by taking away its foundations and rendering its enforcement unjust.

The judgment must be reversed and the cause remanded.

Judgment reversed.[42]

RICO v. BRANDENSTEIN.[43]

Supreme Court of California, 1893. 98 Cal. 465, 33 Pac. 480, 20 L. R. A. 702, 35 Am. St. Rep. 192.

SEARLS, C. Appeal from a judgment in favor of defendants, and from an order denying a motion for a new trial.

The action was brought for a partition of the southeast two-thirds of the Rancho San Barnardino, situate in the county of Monterey. The two plaintiffs claim to be the owners of an undivided one-eighth, each as tenants in common, with defendants Brandenstein and God-

wife owed the husband, his liability for her debts caused it. Under the statutes giving married women their separate property, even where such statutes did not permit suits between husband and wife, it has been held that marriage does not extinguish the liability, and the claim may be transferred to a third person who can enforce it. Power v. Lester, 23 N. Y. 527 (1861); Spencer v. Stockwell, 76 Vt. 176, 56 A. 661 (1904). Contra: Gosnell v. Jones, 152 Ind. 638, 53 N. E. 381 (1899); Abbott v. Winchester, 105 Mass. 115 (1870); Schilling v. Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892 (1899).

Even before the statutes, a contract between the parties before marriage, under which performance was not due until after the coverture should end, could be enforced when performance was due, Milbourn v. Ewart, 5 Term. R. 381 (1793), and a contract creating an equitable property interest could be enforced in equity, Cannell v. Buckle, 2 P. Wms. 242 (1724).

[42] Accord: Smith v. Martin, 124 Mich. 34, 82 N. W. 662 (1900). In many states this result has been effected by express statutory provisions.

[43] CONVEYANCES BETWEEN HUSBAND AND WIFE AT COMMON LAW, IN EQUITY, AND UNDER THE MARRIED WOMEN'S ACTS.—At common law a direct conveyance of land from one spouse to the other was void. Firebrass v. Pennant, 2 Wils.

chaux, who are averred to be each the owner of an undivided three-eighths in said rancho. The answer denies the ownership of plaintiffs, or that they were ever tenants in common with defendants, and avers ownership in defendants to the entire tract of land except as to certain lots conveyed by them to third parties. The area of the land in question is 8,901 and $^{25}/_{100}$ acres. Francisco Rico, the father of the plaintiffs, on the tenth day of January, 1855, became the owner of the premises in controversy, and on August 27, 1855, conveyed the same by deed to Tomasa Sepulveda Rico, his wife. The title asserted by plaintiffs in the action rests upon a deed of trust of the premises, dated November 9, 1857, executed by Francisco Rico and Tomasa Sepulveda Rico, his wife, as parties of the first part, to the said Francisco Rico, as party of the second part. The deed purports to be in consideration of $15,000, paid to the parties of the first part by Theodora Gonzales and Jose Sepulveda, the receipt of which is acknowledged and which the proofs show was actually paid. The remaining portions of the deed important to the inquiry, are as follows: "And by these presents doth bargain, sell, remise, release, and quit-claim and convey unto Francisco Rico, in trust for and the use, interest, behoof, benefit of Guadalupe Rico, Francisco Rico, Junior, Vicente Rico, and Alexander Rico, all being legitimate children of the parties of the first part hereof, * * * all now living, and all other offspring that may be born hereafter of the said parties of the first part thereof, all the right, title, and interest of the parties of the first part

254 (1764); White v. Wager, 25 N. Y. 328 (1862). Such a purpose was accomplished by a conveyance to a third party, who in turn conveyed to the spouse intended to take. Jewell v. Porter, 31 N. H. 34 (1855). In equity, however, a husband's conveyance of a fair proportion of his property to his wife as a provision for her was held to make him a trustee for her, of the property conveyed. Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396 (1823); Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629 (1905). In Sanford v. Sanford (N. J. Ch.) 138 A. 707 (1927), a conveyance by a husband to his wife of an unreasonable and improvident proportion of his property was rescinded in equity.

The wife could convey her equitable separate estate to her husband, if it was not under a restraint against alienation. Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319 (1888). But even in equity her conveyance of her general estate to her husband was void. Worrell v. Drake, 110 Tenn. 303, 75 S. W. 1015 (1903).

Under statutes simply giving a married woman full control over and power to convey her property, but not stating whether she may convey to her husband, there is a conflict of authority as to whether she may do so. In Allen v. Hooper, 50 Me. 371 (1862), it was held that she may. In White v. Wager, 25 N. Y. 328 (1862), it was held that, although the wife had the capacity to convey, the husband was under an incapacity to receive from her, which had not been removed. This rule has been changed by statute in New York (Laws of 1887, c. 37).

It is generally held under such statutes that the husband may convey to the wife, and pass the legal title to her, instead of merely becoming a trustee for her, as he would have been prior to the statutes. Wells v. Caywood, 3 Colo. 487 (1877); Luttrell v. Boggs, 168 Ill. 361, 48 N. E. 171 (1897); Burdeno v. Amperse, 14 Mich. 91, 90 Am. Dec. 225 (1866).

hereof in and to. * * * This conveyance is intended as a deed of trust, to be held by the said Francisco Rico, under the express conditions hereinafter set forth, that is to say, to hold the same aforementioned premises to, and for the uses, interests, and purposes of the said minors, Guadalupe, Francisco, Vicente, and Alexander Rico, now living, and also all other children that may be born hereafter of the said parties of the first part hereof, to receive the rents, issues, and profits of the said lands and improvements thereon, and apply the same to the use and benefit of the said afore-mentioned children now living, and all others that may be born hereafter of the said parties of the first part hereof during their natural lives." Then follows a clause authorizing the said Francisco Rico to appoint his successors as trustee of said property for said children during his lifetime and by will after his death. The trustee and beneficiaries are forbidden to sell, pledge, or hypothecate, the land and premises described in the deed. The deed was duly acknowledged and recorded in the office of the county recorder of the county of Monterey, November 9, 1857.

Francisco Rico, the grantee of the deed of trust, was one and the same person with Francisco Rico, one of the grantors, and the grantors were husband and wife. The plaintiffs herein were their children, born subsequent to the execution of the deed of trust. Defendants Brandenstein and Godchaux hold the premises under a conveyance in trust, executed by the same grantors in 1862, to third parties as trustees.

It was admitted at the trial, for the purposes of the case, that if plaintiffs are not the owners of two-eighths of the rancho defendants are the owners thereof.

The first question presented by the record relates to the validity of the deed from Rico and wife to the husband. It must be assumed that at common law the wife could not convey her separate property to her husband. The contention of appellant is, that conceding the property to have been the separate property of the wife, still, at the time of the deed there was under the statute of this state no restriction upon such a conveyance.

Section 14, art. 11, of the constitution of this state, adopted October 10, 1849, provided that "All property, both real and personal of the wife, owned and claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property as to that held in common with her husband." By an act approved April 17, 1850, the legislature, in obedience to the requirements of the constitution, passed a law by which the husband was given "the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon unless by an

instrument in writing, signed by the husband and wife and acknowledged by her upon an examination separate and apart from her husband before," etc. The seventh section of the same act provided, "that when any sale shall be made by the wife of any of her separate property for the benefit of her husband, or when he shall have used the proceeds of such sale, with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same." St. 1850, p. 254. An act concerning conveyances, passed April 16, 1850, provides as follows:

"Sec. 19. A married woman may convey any of her real estate by any conveyances thereof, executed and acknowledged by herself and her husband, and certified, in the manner hereinafter provided by the proper officer taking the acknowledgment."

A number of other statutes might be referred to tending to indicate the evident policy of our law-makers, to loosen the chains which bound married women at the common law, and so far as their separate property is concerned, to confer upon them like power of alienation with that possessed by their husbands. Step by step the work has gone on until now "a conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner." Civ. Code, § 1189.

We are dealing, however, with a question which depends not upon the present condition of the law, but upon the status and rights of married women as they existed in 1857, the date of the deed under consideration. No question is made here as to the due execution of the deed by the husband and wife, or that it was properly acknowledged as required by statute. The contention of respondents in this behalf is that the deed is void, because at the date of its execution, to wit, November 9, 1857, a married woman could not convey real property directly to her husband. The husband was required to join in the conveyance. The objects of the statute in requiring the husband to join with his wife in the conveyance of her separate property, as it has been said, was to afford her his protection against imposition and fraud, and to aid her by his counsel and advice. Meagher v. Thompson, 49 Cal. 190. The requirement of the statute is analogous to the rule of the civil law, under which the wife must have the authorization of her husband, or a decree of a judge, before she could convey any of her rights or enter into a civil contract. The wider experience of men in business affairs, their better opportunities for becoming conversant with property values, and the mode of its transfer, as well as the important object of promoting unity of purpose and harmony of action in the close relation existing between husband and wife, may well have conduced to the enactment of the law requiring them to join in a conveyance of property, which, while belonging to the wife, was yet subject to the management and control of the husband. The law required them to join in the conveyance, and there is no disposition to question either its

wisdom or its binding force, and these remarks are only indulged as tending to a better understanding of the cognate question, Can the husband and wife convey her separate real property to the former?

This court has repeatedly decided that a husband, when free from debt, may make a gift to his wife of either his separate property, or of the community property of the husband and wife. Barker v. Koneman, 13 Cal. 9; Peck v. Brummagim, 31 Cal. 441, 89 Am. Dec. 195; Dow v. Gould, etc. Co., 31 Cal. 653; Woods v. Whitney, 42 Cal. 361; Higgins v. Higgins, 46 Cal. 263. It does not necessarily follow that the converse of the proposition is true, and that the wife can convey by way of gift to her husband. If, however, she cannot do so, or rather, if she could not do so under the law we are considering, viz., the statute in force in 1857, it must be because of the inherent condition of the parties as husband and wife.

The owner of property competent to convey may convert himself into a trustee by making a proper declaration of the trust in writing. Suarez v. Pumpelly, 2 Sandf. Ch. (N. Y.) 336; Pinkett v. Wright, 2 Hare, 120. A trust is valid only to the extent of the legal capacity of the one creating it. Tiff. & B. on Trusts and Trustees, p. 2. Any person may create a trust who is capable of making a valid distribution of property. The power to dispose of property involves the right to attach such limitations to the act of disposition as will vest the legal estate in one and the beneficial interest in another. At common law neither husband nor wife could convey property directly to the other. The power to alienate and to take property on the part of the husband was unaffected by marriage, except in the single instance of conveyances to and from his wife. To the wife the common-law system was a source of constant repression. Her husband became the absolute owner of her personal property, and was entitled to the rents, issues and profits of her real estate. To relax the severity of the rules of her environment as a wife, many of the states have adopted laws similar to the one under consideration, empowering her to convey her real property by joining with her husband in the deed of conveyance, and in a few of the states, New York and California (since 1891) included, a conveyance by a married woman may be made in the same manner, and has the same effect as if she were unmarried. Under these laws, however, the courts in numerous instances still adhere to the doctrine that the wife cannot convey her property directly to her husband.

The general result of the reasoning of the cases may be summarized as follows:

1. These statutes are for the benefit of married women and not for that of their husbands; and any construction which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the very object of the law.

2. The inhibition of the common law, as applied to the husband, was

that he could neither convey to his wife directly, or be a grantee from her; and while the right of the wife to take by gift removes the impediment to a voluntary conveyance from the husband to her, yet the right to receive such voluntary conveyance from the wife has not been conferred upon the husband, and he stands as at common law incapacitated from taking by deed of gift directly from his wife.

3. The "power to convey and devise real and personal property as if she was unmarried" does not enlarge the powers of the grantees under conveyances by her, and she could not devise to a corporation or person incapable of taking by will, or convey to one incompetent to be a grantee.

4. To render a conveyance from the wife to her husband valid, the husband's common-law disability, as well as that of the wife, must be removed. White v. Wager, 25 N. Y. 328; Brooks v. Kearns, 86 Ill. 547; Scarborough v. Watkins, 9 B. Mon. (Ky.) 545, 50 Am. Dec. 528; Card's Leg. & Eq. Rights Mar. Wom. § 428; Amer. & Eng. Encycl. of Law, tit. "Husband and Wife," p. 794; Bish. Mar. Wom. §§ 711, 712; Kinnaman v. Pyle, 44 Ind. 275; Winans v. Peebles, 32 N. Y. 423; Sims v. Rickets, 35 Ind. 181, 9 Am. Rep. 679.

I find no case extant in which under a statute requiring the husband and wife to join in the conveyance of her separate property, a sale and conveyance from the latter to the former has been sustained. The law having provided for the joinder of the husband in this class of conveyances, with a view, as has often been declared by this court, of giving the wife the benefit of the husband's counsel, advice, and judgment, it would seem strange and illogical to permit him at the same time to act as her opponent, as one working against her interests and seeking to obtain her land for himself, either with or without limitations upon the effect of the conveyance.

In Colorado, Iowa, and some other states, statutes have been passed giving to married women the same rights of alienation of their separate property as those enjoyed by unmarried women. Where such laws prevail, we may reasonably expect to see their right to convey directly to their husbands as well as to others finally upheld, as has already been done in a number of cases. Wells v. Caywood, 3 Colo. 487; Simms v. Henry, 19 Iowa, 287; Robertson v. Robertson, 25 Iowa, 350; Allen v. Hooper, 50 Me. 371; Burdeno v. Amperse, 14 Mich. 97, 90 Am. Dec. 225.

The views herein enunciated are expressly confined to an interpretation of the statute as it existed prior to the amendment of 1891, and are not intended as an exposition of the rights of married women under the broader ægis of that amendment.

I am of opinion that under the law as it existed in 1857, the husband and wife could not legally convey her separate real estate to the husband, and that the deed of trust to the latter, set out in the record, was void.

MAD.D.R.

This view renders a consideration of the other points made in the case unimportant.

The judgment and order appealed from should be affirmed.

TEMPLE and BELCHER, CC., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.[44]

HARRISON, J.
GAROUTTE, J.
PATERSON, J.

HAMAR v. MEDSKER.

Supreme Court of Indiana, 1878. 60 Ind. 413.

WORDEN, J. This was an action by the appellant, against the appellees, who were the children and heirs at law of Mary J. Medsker, deceased, and against Jacob Medsker, the surviving husband of the deceased.

The complaint alleged, in substance that, on the 19th day of August, 1871, said Mary J. Medsker, now deceased, was the owner, in her own right, of certain real estate situate in the county of Hamilton, and State of Indiana, being forty acres, more or less, which is fully described by metes and bounds; that on that day the plaintiff purchased the same of her for the sum of one thousand six hundred dollars, in hand paid to said Mary J., and on the same day, in pursuance of his purchase, took possession of the land; that, on the same day, the said Mary J. Medsker, together with her husband, Jacob Medsker, in order to convey to the plaintiff the land so purchased by him, executed a conveyance to him, duly signed, sealed and acknowledged by

44 Accord: Alexander v. Shalala, 228 Pa. 297, 77 A. 554, 31 L. R. A. (N. S.) 844, 139 Am. St. Rep. 1004, 20 Ann. Cas. 1330 (1910); Mullins v. Shrewsbury, 60 W. Va. 694, 55 S. E. 736 (1906). Contra: Brandau v. McCurley, 124 Md. 243, 92 A. 540, L. R. A. 1915C, 767 (1914).

See p. 332, supra, for some of the historical background of such a statute as the one in question in the principal case. Under such statutes, a conveyance of the wife's land to the husband by a deed in which the wife is the sole grantor is void. Hughey v. Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395 (1902).

In Hollander v. Abrams, 99 N. J. Eq. 254, 132 A. 224 (1926), it was held that specific performance would be decreed against a married woman who had misrepresented herself as single, and entered into a contract to convey land, without her husband's joinder as required by the statute. The doctrine of estoppel was applied. The defendant had divorced her husband before the suit. Contra: Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448 (1854). See, also, Dugan v. Powell et ux. (Fla.) 109 So. 202 (1926), where specific performance was decreed against a married woman whose contract did not comply with the statutory requirements, but who nevertheless retained the consideration.

In Foust v. Hill, 215 Ky. 364, 285 S. W. 235 (1926), it was held that the husband's merely signing and acknowledging a deed to a third person in which the wife appeared as the sole grantor was not a compliance with the statute. The authorities are collected in a note in 11 Minn. L. Rev. 377, and are in conflict. See, also, 97 Am. St. Rep. 587, note.

For a recent application of a statute requiring special formalities in a conveyance from a wife to her husband, see Best v. Utley, 189 N. C. 356, 127 S. E. 337 (1926).

said Mary J. and her said husband; that, by mistake of the draftsman who wrote the deed, the description of the land therein was defective, in this, that, after the words "commencing eighty rods west," the words "of south-east corner of the south-east quarter" were omitted, and that in consequence the starting-point, in describing the metes and bounds of said tract of land, was inaccurately stated; that the tract of land herein first described is the identical tract of land intended to be conveyed by said deed at the time of the execution thereof by all the parties thereto, being the same tract that he purchased, paid for and took possession of as before stated; that the plaintiff put his deed upon record, and did not discover the defect in the description until after the death of said Mary J.

Prayer for a reformation of the deed and the correction of the mistake.

Jacob Medsker, the husband of the deceased, made default, and as to him no question arises in the record.

A guardian ad litem was appointed for the other defendants, who were the minor heirs of the deceased, and on their behalf he filed a demurrer to the complaint, for want of sufficient facts. The demurrer was sustained and final judgment rendered in favor of the demurring parties. Exception and appeal.

It is within the general jurisdiction of a court of equity to grant relief by reforming written instruments, and correcting mistakes therein; and the relief is afforded perhaps more frequently in cases of mistake in the description of land intended to be conveyed, than in any other class of cases.

We have no brief for the appellees, and are, therefore, not advised in what particular the complaint was supposed to be defective. We see no objection to the complaint, however, if the alleged mistake can be corrected, and the deed reformed, as against a married woman, or, in case of her death, against her heirs. We infer that the demurrer was sustained on the ground, that, in the opinion of the court below, the mistake could not be corrected as against a married woman, and therefore could not, as against her heirs.

We have the following statutory provision, viz.:

"No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: Provided, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." 1 Rev. St. 1876, p. 550, § 5.

This provision has been so far modified, by another statute, as that a seal is dispensed with in instruments executed by husband and wife, as in other cases. The American Insurance Co. v. Avery, 60 Ind. 566.

Doubtless the lands of a married woman can be conveyed or encumbered in no other mode than that prescribed by the statute; and

her agreements in relation thereto, not executed in the manner prescribed by the statute, are void. Baxter v. Bodkin, 25 Ind. 172; Stevens v. Parish, 29 Ind. 260, 95 Am. Dec. 636; Shumaker v. Johnson, 35 Ind. 33; Behler v. Weyburn, 59 Ind. 143; The American Insurance Co. v. Avery, supra; Glidden v. Strupler, 52 Pa. 400; Dickinson v. Glenney, 27 Conn. 104.

Where a married woman has attempted to convey her estate, but the conveyance is defective for want of compliance with the requisites of the statute, a court of equity will not lend its aid.

In such case, the court will not require her to make a conveyance in accordance with the requirements of the statute, as this would not only contravene the policy of the law, but it would be requiring her to make such a contract as she herself has not made.

Nor is there, in such case, any valid contract that can be enforced by way of specific performance, because the feme covert is incapable in law of making such contract except in the manner prescribed by the statute. Dickinson v. Glenney, supra.

But where, as in this case, a married woman has sold her land and received the purchase-money, and has executed a deed intended to convey the same, in conjunction with her husband, in all respects in accordance with the statute, and perfect except in the description of the land sold and intended to be conveyed, we think the mistake in the description may be corrected as against her, and, of course, as against her heirs.

If such mistake could not be corrected, gross wrong and injustice would result. It is scarcely necessary to say that it would be grossly unjust for her to retain the purchase-money and also the land.

By the reformation of the deed and the correction of the mistake, the object and policy of the statute are not contravened or thwarted.

A deed had been executed by the wife, in conjunction with her husband, for the land intended to be conveyed. This satisfies the requirements of the statute, and the title of the purchaser ought not to be defeated by the mistake in the description of the land intended to be thereby conveyed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.[45]

STILES, J., in BOARD OF TRADE OF CITY OF SEATTLE et al. v. HAYDEN. Supreme Court of Washington, 1893. 4 Wash. 263, 30 P. 87, 32 P. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919: "In this opinion we shall not discuss the question how large her power is, but confine ourselves to the single matter before us. Counsel for respondents contend that, as it is the evident purpose of these provisions to

[45] Accord: Styers v. Robbins, 76 Ind. 547 (1881). But see Moulton v. Hurd 20 Ill. 137, 71 Am. Dec. 257 (1858).

emancipate the wife from the control of the husband and to enfranchise her with the power, denied to her under the common law, to acquire, hold, enjoy, and dispose of property, and do business on her own account as freely as he can, or even more freely than he can, under the same act, it must follow that she can enter into a contract of partnership in all the ways, and with all the liabilities, that her husband can, and that, unless she is permitted and held to be able to enter into the same contracts with him that she can with others, she is deprived of the full measure of liberty which the law intends to confer upon her. It may be said that she can and in some cases will be held to become a general partner with third persons under the terms of the act, and the necessary implications thereof. It has been so held in Newman v. Morris, 52 Miss. 402, Abbott v. Jackson, 43 Ark. 212, and elsewhere, when no one of the persons engaged with her as partners was her husband. But the question still remains, Does the statute intend that she can enter into ordinary contracts with her husband, and particularly the contract of partnership? On this point we think the position of the respondents is antagonistic to itself. In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that unless she can become his partner she will not be wholly free, if yielded to, will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordinary persuasion, or by his mere declaration made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility, which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which, it seems to us, stands out the most clearly in the act in question, i. e., to secure her protection in the management and enjoyment of her estate, would be defeated. * * *

"But in Lord v. Parker, 3 Allen, 127, it was held that she could not be a partner in a firm where her husband was a partner. Speaking of the statutes the court said: 'Their leading object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or to receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure and might

subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her "sole and separate" property. The power to arrange the terms of such a contract would open wide the door to fraud in relation to the property of the husband. If she could contract with her husband, it would seem to follow that she could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive, and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings in invitum under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical could have been contemplated by the Legislature, without a much more direct and clear manifestation of its will.' " [46]

MARION, J., in BURWELL v. SOUTH CAROLINA TAX COMMISSION. Supreme Court of South Carolina, 1924. 130 S. C. 199, 211, 126 S. E. 29, 38 A. L. R. 1256: "If the effect of this provision of the Constitution of 1895 was to free a married woman from all the common-law disabilities of coverture as to property rights, and to confer an unlimited power to contract, as we think it was, we know of no valid reason which would justify the courts in withholding the power or in denying the right of a married woman to enter into a contract of partnership with her husband. Any reason for denying such right or capacity would apparently have to be grounded in the proposition that by implication a 'disability as to business transactions and contracts, springing from the common-law notion of the unity of the husband and wife, still obtains.' But when we consider the changes wrought in the common-law status of a married woman by the present Constitution and statutes—'that they withdraw from the husband the ownership, control, disposition, and enjoyment of the wife's estate; that the same are secured to her as though she were a feme sole; that the right to her personal services and the fruits of her labor are denied to him and given to her; that her will is freed from the dominion of his as to all property rights; that she may without his consent enter into the closest business relations with third persons'—there would seem to be no room for the legitimate indulgence of that implication." [47]

[46] The court held that the husband and wife could not be partners.

[47] The authorities are in conflict on this question. See 38 A. L. R. 1264.

VALIDITY OF TRANSACTIONS BETWEEN HUSBAND AND WIFE AS AGAINST THE HUSBAND'S CREDITORS [48]

This is left principally to treatment in connection with conveyances in fraud of creditors, dealt with elsewhere in this series of casebooks. The following points may with propriety be here noted:

A prima facie inference of fact that property purchased by the wife was so purchased with the property of the husband, which he gave to her, exists even after married women's legislation, which gives to the wife her legal separate estate. Hence, in a suit by the creditor of the husband to subject the property in the name of the wife to the husband's debts, the burden of going forward with evidence in the first instance is upon the wife to show that the property was purchased with her own separate estate. Winter v. Walter, 37 Pa. 155 (1860); Murdoch v. Baker, 46 W. Va. 78, 32 S. E. 1009 (1899); Harr v. Shaffer, 52 W. Va. 207, 43 S. E. 89 (1902).

It seems that, since a man's creditors cannot reach the value of his labor or personal services, he may give these as he pleases to his wife for the benefit of her separate estate. Garvin v. Gaebe, Adm'r, 72 Ill. 447 (1874); Bongard v. Core, 82 Ill. 19 (1876); Alsdurf v. Williams, 196 Ill. 244, 63 N. E. 686 (1902); Nance v. Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378 (1887); Mayers v. Kaiser, 85 Wis. 382, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. Rep. 849 (1893); Arnold v. Talcott, 55 N. J. Eq. 519, 37 A. 891 (1896); Hibbard v. Heckart, 88 Mo. App. 544 (1901); Sharp v. Fitzhugh, 75 S. W. 562, 88 S. W. 929 (1905). But it is essential that the services be in reality given for the wife's separate estate, and that her property be not in fact loaned to the husband to conduct his own business with. In the latter case the increase at least may be reached by the creditor as the husband's property. Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703 (1904); Pease v. Barkowsky, 67 Ill. App. 274 (1896); Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98 (1866); Boggess v. Richards, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938 (1894); [Patton v. Smith, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124, with note (1908)].

If the husband puts his own personal property into improvements upon his wife's real estate, so that the title passes to the wife by the annexation of the husband's chattels to the realty, then if the intent to deprive the husband's creditors exists on the part of the husband alone, and the wife is a mere passive and innocent recipient of the favor, it has been held that the husband's creditors can nevertheless reach the loan to the extent of its enhanced value by reason of the improvements, not to exceed the value of the property put in. Caswell v. Hill, 47 N. H. 407 (1867); Morris v. Fletcher, 67 Ark. 105, 56 S. W. 1072, 77

[48] Kales' Cases on Persons, p. 596, note.

Am. St. Rep. 87 (1899); Ware v. Hamilton Shoe Co., 92 Ala. 145, 9 So. 136 (1890); Administrator of Smith v. Poythress, 2 Fla. 92, 48 Am. Dec. 176 (1848); Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 376 (1870); Hancock v. Adams, 87 Ky. 417, 9 S. W. 246, 10 Ky. Law Rep. 371 (1888). Contra: Corning v. Fowler, 24 Iowa, 584 (1868); McFerrin v. Carter, 3 Baxt. (Tenn.) 335 (1874).

If, however, the act of the husband is not in fraud of creditors, so far as he is concerned the creditor has no standing to secure payment out of the wife's real estate. Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632 (1860).

CHAPTER 2

RIGHT OF HUSBAND TO EARNINGS, SERVICES AND SOCIETY OF WIFE—RIGHTS OF WIFE IN HUSBAND

BUCKLEY v. COLLIER.

Mich. 4 W. & M. B. R., 1693. 1 Salk. 114.

Baron and feme declared, That the defendant being indebted to them for work done by the wife, in making him a peruke, he promised to pay, and had not paid, ad dampn. ipsorum, &c. To this there was a frivolous plea, and upon that a demurrer. The plaintiff cited 3 Cro. 205; 3 Cro. 61, 96; 1 Cro. 438; but relied principally upon Burchet's case.

PER CUR. Burchet's case differs: there was an express promise to the wife, and to that the husband assented by bringing action thereupon: but here is no express promise laid to the wife; here is nothing but the promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he may bring a quantum meruit. Also the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband; for if the wife dies, her debts fall upon the husband; and therefore so shall the profits of her trade to the husband's executors. But this must be intended of work done during the coverture, and not after. Judgment pro def.

JASSOY v. DELIUS.

Supreme Court of Illinois, 1872. 65 Ill. 469.

Mr. Justice SHELDON delivered the opinion of the Court:

This was a creditor's bill, brought by the appellees against John Jassoy and A. B. Jassoy, his wife, to subject certain property, held in the name of the latter, to the payment of a judgment which had been recovered by the appellees against John Jassoy, the husband.

The court below rendered a decree against the defendants for the sum of $273.39 and costs. They appealed.

The proof shows that, in 1861, John Jassoy failed in business as a banker; that his dwelling house was sold at public sale by his assignee, subject to Jassoy's homestead right and a mortgage for $1000, and was afterwards purchased by his wife, A. B. Jassoy, who subsequently sold it for $2500, and after paying the mortgage on it of $1000, she pur-

chased, in her own name, another house for $2200, where she and her husband now live.

In 1862, Mrs. Jassoy entered into the millinery business, which was successful, and she continued in it until in 1871. From the profits of this business she purchased a store in her own name for $4500. This house and store, together with about $1000 money at interest, she appeared to be possessed of at the time of the decree.

Aside from the profits of her millinery business, the proper separate estate which she ever had was only about $2100. The $2000 which she had at the time of her marriage, that being before the passage of the Married Woman's Act, so called, of 1861, belonged to her husband.

The profits arising from the conduct of the millinery business previous to the act of 1869, allowing to married women their earnings,[1] at least all beyond the interest on the amount of the wife's separate capital which was employed, we think, must be regarded as the earnings of the wife, and, as such, be held to belong to the husband.

The proof shows, satisfactorily, that Mrs. Jassoy held, in her name, property of her husband to an amount at least equal to that found by the decree.

The decree must be affirmed.

Decree affirmed.

NUDING v. URICH.

Supreme Court of Pennsylvania, 1895. 169 Pa. 289, 32 Atl. 409.

The fund in court is a portion of the proceeds of the sale under a fieri facias of said plaintiffs against said defendant of the stock and fixtures owned by defendant in a restaurant in the Lehigh Valley Railroad station building at Allentown, kept by defendant. Annie C. Urich, wife of defendant, by a sufficient notice, regularly given, claimed $108, alleged to be due her out of said business for wages, for services as a cook. The only question raised before the learned commissioner and in court is the legality of the contract made by said husband and wife for the payment of said wages.

The relevant facts found by the commissioner in the supplemental report and not disputed on exceptions, are: That on Aug. 1, 1893, defendant's manservant at the restaurant left, and he thereupon contracted with his said wife to take said servant's place—he offered to pay her the same wages he had paid to said servant—$3.00 a week; the wife accepted and did the work of a servant from said date to November 13th of that year, being 15 weeks, for which $45.00 is claimed. That at the time last aforesaid the man who had been employed as cook at $7.00 a week also left, and thereupon defendant and his wife made

1 Under the present statutes in practically all the states a married woman is entitled to her earnings, free from the control of her husband. See, however, Redd & Co. v. W. A. Lathem & Sons, 32 Ga. App. 214, 123 S. E. 175 (1924).

a new contract by which the latter in addition to her former work was to do the cooking for the restaurant and to receive for all such services $7.00 a week; that she did perform said services until Jan. 24, 1894, for which $63.00, is claimed; that nothing was paid; that during said period said parties lived together as husband and wife; that said contract was made in good faith; that the wages contracted for were reasonable, and the services rendered were worth the sum claimed.

The court finds to be a further fact what the commissioner states to be the testimony in the first report, that is: "That during these six months (for which compensation is claimed) Mrs. Urich and the children (of said husband and wife) took their meals or most of them at the restaurant, and that they also slept there, removing to the restaurant some of their household goods, and leaving the rest at their former residence on Lehigh street, that an adult daughter took care of the residence, that the same was at times occupied by the children, and that at other times they remained at the restaurant with their parents." The commissioners appointed to distribute the fund found that the wife's contract with the husband was invalid. Exceptions were filed and sustained and the claim of Annie C. Urich was allowed. Error assigned was in distributing the money to Annie C. Urich.[2]

GREEN, J. If Mrs. Urich had been employed by a stranger to perform the same services that she rendered in this case, and for the same wages, and her husband had consented to such employment, the wages to be paid to her, there can be no doubt she would have had a valid legal title to the earnings, and could have sustained her claim against his will although he might subsequently have claimed the wages on the ground that he was the owner of her earnings as her husband. And the reason why she could recover them as against him would be because he had so contracted. In other words his legal right to her earnings in the absence of a contract, would be gone because of her contract made between him and her. Where he agreed that she might have the earnings he certainly forfeited any claim that he might otherwise have to them and thereby surrendered such claim to her. If now he makes a contract directly with his wife, that he, having occasion for extra and unusual service in the course of his business outside of his family relation and needs, will pay his wife for the performance of such service the special wages, which otherwise he would be obliged to pay to strangers, it is at least true that, so far as he is concerned, he has surrendered to his wife all claim to be the owner of her services, and therefore, of the compensation which he has agreed to pay her. His consent that she shall receive the compensation for the service, certainly divests the case of the aspect that he, as the owner of her services, and therefore of her earnings, is entitled to both against her will, and that element of the contention is removed from the argument. What then is left? Nothing but the proposition that a hus-

[2] Statement abridged.

band and wife cannot make such a contract. Why not? There is nothing in the act of 1893 which gives her a contracting power that denies or restrains her right to contract with her husband. The second section of the act (P. L. 344, Act June 8, 1893) provides that "Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section" (section 1), but she may not become accommodation indorser, nor execute a deed without joining her husband. Here is a very large contracting power conferred with only special restrictions which do not embrace the pending question. Within her limitations a married woman may contract to the same extent, and in the same manner as an unmarried person. The first section defines the subjects of her contracting power thus: "that hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property real, personal or mixed, and either in possession or expectancy," etc.

The word "earnings" does not appear in this act, but as personal services are a species of personal property, it would seem they may be sold, and as earnings represent in common speech the reward for such services, whether in money or chattels, it would seem that they may be "acquired," or "owned," or "possessed," within the fair meaning of the section.

In Lewis' Estate, 156 Pa. 337, 27 Atl. 35, we held that, under the act of 1887, the earnings of a married woman were a species of property and belonged to her and not to her husband, and we all agreed that she should have them, where they were the reward of her personal service; her title to them was absolute, and she could recover them in an action without joining her husband. We do not think the act of 1893 was intended to restrain the meaning of the act of 1887, but to stand as a substitute for it, and with power and authority, and contracting capacity of married women, at least equal to that which was conferred by the act of 1887.

The word "acquire," in the act of 1893, we think includes everything that would be included in the word "earned" in the act of 1887. A reading of the two acts together indicates clearly that the later one was intended to remove some doubts about the construction of the first, and to place the rights and powers of married women upon a broader, more comprehensive and better defined basis than was accomplished by the act of 1887. The title of the act of 1893 expressly states as one of the objects of the act, the "enlarging her capacity to acquire and dispose of property."

In the present case everything that could be done was done by the husband to enable the wife by her own personal service to acquire for herself alone the reward of that service, and no rights of his, in-

dependent of contract, are in the way of her recovery. We agree with the learned court below in the views expressed upon this subject and therefore affirm the decree.

Decree affirmed and appeal dismissed at the cost of the appellants.

WILLIAMS and MITCHELL, JJ. We dissent from this judgment. If it be conceded that the alleged contract is good between the parties it is not good as against the husband's creditors.

BLAECHINSKA v. HOWARD MISSION & HOME FOR LITTLE WANDERERS.

Court of Appeals of New York, Second Division, 1892. 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

Action by Hedwig Blaechinska against the Howard Mission & Home for Little Wanderers to recover damages which the plaintiff claims to have sustained through the negligence of the defendant in maintaining a broken cover over a coal-hole in a public sidewalk, which caused her to fall and break her arm. There was judgment for plaintiff. Defendant appeals from a judgment of the general term affirming the said judgment, and also affirming an order denying a motion for a new trial. Reversed.

VANN, J. Upon the trial of this action the plaintiff testified that, at the time she was injured, she was living with her husband, a custom tailor, for whom she worked as a seamstress. She was then asked by her counsel, "Were you in receipt of a salary from him?" and under objection answered: "Yes, I received a salary of five and six dollars a week; and I did all the housework, and now I can't do it, and I must have help. I used to do very good tailoring, but I can't do it now." On her cross-examination, she testified that she used the money thus earned by her for the children, and the general support of the family. It did not appear that she had any separate estate or business. The court charged the jury that the plaintiff, if she could recover at all, was entitled "to recover for the loss of wages which she has sustained." The exceptions taken by the defendant to these rulings present the only question that we are asked to decide on this appeal.

The learned general term affirmed the judgment of the circuit on the ground that the money which the plaintiff had been accustomed to receive from her husband for services rendered outside of her household duties was her own property, and that the loss of the salary could be given in evidence as an element of damage, the same as if she had been working for a stranger. The only cases cited in support of this conclusion are Brooks v. Schwerin, 54 N. Y. 343, and Reynolds v. Robinson, 64 N. Y. 589. The enabling act of 1860 (Laws 1860, c. 90, as amended by Laws 1862, c. 172,) makes separate property out of that which a married woman "acquires by her trade, business, labor, or

services, carried on or performed on her sole and separate account." As the husband is entitled to the services of his wife at common law, it has uniformly been held that the statute does not apply to labor performed by her for him in his household, even if it is of somewhat extraordinary character. Reynolds v. Robinson, 64 N. Y. 589; Coleman v. Burr, 93 N. Y. 17. But the husband's right to the services of his wife is not limited to those performed for him in his house; for, when she works for him out of doors upon his farm, she is entitled to no pecuniary compensation, and his written promise to pay her therefor is without consideration. Whitaker v. Whitaker, 52 N. Y. 368, 371. When she works with her husband for another, and their joint earnings are used to support the family, if there is no special contract that she is to receive the avails of her labor, they belong to him, and he is entitled to recover their value. Birkbeck v. Ackroyd, 74 N. Y. 356, 11 Hun, 365; Beau v. Kiah, 4 Hun, 171.

Until recently the power of a married woman to make general contracts, not relating to labor to be "performed, on her sole and separate account," depended upon the act of 1860; and the possession of a separate estate, or engagement in a separate business, was essential to their validity, although she might become liable through her representations by estoppel. Linderman v. Farquharson, 101 N. Y. 434, 5 N. E. 67; Frecking v. Rolland, 53 N. Y. 422; Insurance Co. v. Babcock, 42 N. Y. 613; Bodine v. Killeen, 53 N. Y. 93. In 1884 her powers were amplified so that she may now enter into contracts to the same extent, with like effect, and in the same form, as if unmarried, whether such contracts relate to her separate estate or not; but this enlargement of her rights does not extend to any contract between herself and her husband. Laws 1884, c. 381. She has further been authorized by statute to convey lands directly to, and to accept conveyances directly from, her husband, without the intervention of a third person. Laws 1887, c. 537. Under the act of 1860, she could contract with her husband in relation to her separate estate; for as to that she stood "at law on the same footing as if unmarried." Noel v. Kinney, 106 N. Y. 74, 78, 12 N. E. 351; Stanley v. Bank, 115 N. Y. 122, 22 N. E. 29; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304; Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488; Bank v. Guenther, 123 N. Y. 568, 25 N. E. 986; Owen v. Cawley, 36 N. Y. 600; Bodine v. Killeen, 53 N. Y. 93; Frecking v. Rolland, Id. 422; Knapp v. Smith, 27 N. Y. 277; Seymour v. Fellows, 77 N. Y. 178. The contract in Hendricks v. Isaacs, 117 N. Y. 411, 22 N. E. 1029, was doubtless regarded as not relating to the separate estate of the wife; and on this basis it is not in conflict with the authorities cited above.

But, while she can thus contract with her husband with reference to her separate property, can she make a binding agreement with him as to her own services, to be rendered outside of her household duties, and having no connection with a separate business or estate? In other words, can she hire out to him, to work in his store, or factory, and

compel him to pay the price agreed upon for her services? If she can, it follows that the plaintiff was entitled to her earnings under the contract that may be implied from the payment of wages to her by her husband, and, her ability to earn having been impaired by the negligence of the defendant, the fact was properly proved before and submitted to the jury; otherwise, the evidence objected to was improperly received, and it was error to instruct the jury that they might consider it in assessing the damages. As a man cannot make a valid contract to pay his wife for extraordinary services rendered in his household or for working on his farm, how can he make a valid contract to pay her for helping him make clothes in his business as a custom tailor? What basis is there for any distinction? Does the statute which so modified the common law as to give to the wife her earnings from her own labor, performed on her "sole and separate account," contemplate that services for her husband can be performed on her "sole and separate account," unless they have some relation to a separate estate? Under the rule laid down in Coleman v. Burr and Whitaker v. Whitaker, supra, the words "sole and separate account," as used in the statute, cannot mean simply an election on the part of the wife to work for her own benefit, regardless of whom the work is done for. In those cases, her election to work for herself, although manifest, did not take the contract out of the common-law rule. In deciding Whitaker v. Whitaker the court used this significant language: "If a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household, * * * the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services." It seems to be the policy of the legislature, as indicated by recent enactments, to relieve every married woman of the disability of coverture in contracting with any one except her husband. As to him the restriction is continued, except that the formality of conveying real estate through the medium of a third person is no longer required. The object of the legislature was, probably, to protect the marital relation, as well as to prevent the perpetration of frauds upon creditors. Every experienced observer realizes that an unlimited right on the part of the wife to contract with her husband would afford an easy cover for fraud, and would be a perpetual menace to creditors.

The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for any one except her husband, her common-law duty to him remains; and, if he promises to pay her for working for him, it is a promise to pay for that which legally belongs to him. The fact that he cannot require her to perform services for him outside of the household does not affect the question, for he could not require it at common law. Such services as she does render him, whether within or without the strict line of her duty, belong to him. If he pays her for them, it is a gift. If he promises to

pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him. We think the rule is well stated by a recent writer when he says that the enabling acts do not apply to the labor performed by a married woman "for her husband, or bestowed on his business, or in his household, or in his care, or in the care of his family; for in such cases it is her marital duty, and he is not liable to pay for the services of his wife." Kelly, Cont. Mar. Wom. 153. These views are not in conflict with Brooks v. Schwerin, 54 N. Y. 343. The plaintiff in that case—a married woman—lived with her husband, and took charge of the family. Having been injured by the negligence of the defendant, she was allowed to show, under objection, on the trial of an action brought to recover damages therefor, that she had worked out, and received 10 shillings a day. The court refused to charge that she could not recover for her time and services while disabled. It was held by three out of the five commissioners who participated in the decision that the evidence was competent, and that the request was too broad, and was properly refused for that reason. The distinction between that case and this is that in the former the wife worked for a third person, while in the latter she worked for her husband. When she worked for a stranger it was on her sole and separate account, and the enabling act protected her contract. When she worked for her husband, it was on his account, and the statute did not apply. In Filer v. Railroad Co., 49 N. Y. 47, a leading case upon the subject, it was held that a wife, not engaged in business, or in performing labor on her sole and separate account, when injured by the wrongful act of another, could not recover consequential damages resulting from her inability to labor. The court said: "Her services and earnings belonged to her husband; and for the loss of such services, caused by the accident, he may have an action. * * * She is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury and for direct and immediate damages, unless she is, on her own account and for her own benefit, engaged in some business in which she sustains a loss."

While we have considered, we have not cited, many cases that bear more or less directly upon the general subject, but have referred to such as declare, limit, and illustrate the law relating to the capacity of a married woman to contract with her husband in relation to her own services. Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only, and that the consequential damages for loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her; but the damages for the loss of her services belong to him, because the

common law gave them to him, and the statute has not taken them away. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur.[3]

NEWTON et ux. v. HATTER.

Court of King's Bench, 1705. 2 Ld. Raym. 1208.

The plaintiffs brought an action of assault and battery, for a battery committed on them both; judgment by default, and a writ of enquiry was executed 17 of May 1705, and intire damages, viz. £71 10s. was given. And on the return of the writ of inquiry judgment was arrested, because the wife cannot be joined in an action with the husband for a battery on the husband, Easter term last. After which they brought a new action, only for the battery committed on the wife, and laid it ad damnum ipsius Johannis the husband. On not guilty pleaded, verdict was given for the plaintiff. And Mr. Ketelby moved in arrest of judgment, because it ought to have been ad damnum ipsorum, the damages in such case surviving to the wife, if the husband dies before they are received, and cited 1 Sid. 387, Hoffin v. Byles. And of that opinion was the court. And Mr. Raymond moved to arrest their own judgment for expedition.[4]

SMITH v. CITY OF ST. JOSEPH.

Supreme Court of Missouri, 1874. 55 Mo. 456, 17 Am. Rep. 600.

WAGNER, Judge. This was an action instituted by the plaintiff to recover damages for the loss of the services of his wife, and necessary expenses of medicine, doctor's bills and nurse hire paid out by him, in consequence of an injury to her which is alleged to have been occasioned by the negligence of the defendant. The charge is, that the injury to the plaintiff's wife was the result of her falling down an enbankment in one of the streets of the defendant, which was negligently left in an exposed and dangerous condition. One branch of this case has previously been in this court. Smith v. City of St. Joseph, 45 Mo. 449. There the proceeding was in favor of the wife as the meritorious cause of action, the husband being joined with her

[3] See "Husband's Right to Wife's Services," by Joseph Warren, 38 Harv. L. Rev. 421, and 622.

[4] At common law the wife's claim on account of a tortious injury to her was, like her other choses in action, reducible to possession by her husband during the coverture, for his own benefit. See Ballard v. Russell, 33 Me. 196. 54 Am. Dec. 620 (1851), where the husband, who had not supported his wife for eight years, released to the defendant for a consideration the wife's right of action against the defendant for an injury to her person, and the release was held to be a bar to a suit by the wife.

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under the requirements of the statute, to recover damages for the personal injuries and physical suffering that she had sustained. But the petition was founded upon the same accident, and the same questions in regard to defendant's liability and negligence arose in that case that arise here.

The rules of law then laid down, were strictly conformed to and pursued in the trial of this case, on the questions of defendant's liability and negligence, and therefore it is unnecessary to review them at the present time. * * *

The main questions, however, relied on for a reversal of this judgment, are, that the former judgment was a bar to the maintenance of this action, and that the court erred in its instruction in reference to damages. The judgment rendered in favor of plaintiff and wife in the former suit was solely for the damages resulting to the wife in consequence of the injuries received by her. She was the meritorious cause of the action, and the husband was merely joined under the provisions of the statute to enable her to sue.[5] But the damages there were strictly confined to her personal injuries, and the expenses incurred by the husband, and loss of service which constitute the foundation of this action were not in that case. In some of the New England States, under the provisions of statutes regulating the subject, it is held that but one action can be maintained. Those statutes permit all the damages incident to and growing out of the injury to be recovered in the same suit. They provide for but one action. But in the other States, where no such statutory regulations exist, a contrary doctrine is held. In the case of McKinney v. Western Stage Co., 4 Iowa, 420, the court says: "We suppose that at common law the rule is well settled, that for an injury to the person of the wife during coverture, by battery or to her character by slander or any such injury, the wife must join with the husband in the suit. When, however, the injury is such that the husband receives a separate loss or damage as, if in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name. Barnes v. Hurd, 11 Mass. 59; Lewis v. Babcock, 18 Johns. (N. Y.) 443; 2 Saund. Pl. & Ev., 568. And this rule we do not understand to be changed by the code."

The Indiana Court holds, also, that the established doctrine is, that for a tort committed upon a wife, two actions will lie, one by the husband alone for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person. Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Ohio & M. R. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259; Boyd v. Blaidell, 15 Ind. 73.

In the case of Fuller v. Naugatuck R. R. Co., 21 Conn. 557, it is

[5] The statutes vary. Many of them now provide in effect that a married woman may sue and be sued as if sole. Under such statutes, of course, the husband need not join, as was necessary at common law.

said that it was clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. The same principle has been often adjudged in different cases and laid down in elementary treatises. Reeve's Dom. Rel., 291; Whitney v. Hitchcock, 4 Denio (N. Y.) 461; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; Bartley v. Ritchtmeyer, 4 N. Y. 38, 53 Am. Dec. 338; Klingman v. Holmes, 54 Mo. 304.

We think there can be no doubt respecting the maintenance of the action, and that there is no bar in consequence of the previous recovery. On the question of damages the court instructed the jury, that if they found for the plaintiff they should assess his damages at such sum, as was shown by the evidence would compensate him for the expenses he had necessarily incurred, in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained in falling over the embankment, including compensation for his services in waiting upon her, doctor's bills, and costs of medicines and also for the loss of her services directly resulting from the injury. The only serious objection made to this instruction is, that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. Under all the circumstances surrounding this case, I think the instruction was right. The evidence shows that the wife's thigh bone was broken by the fall; that for two months she was so utterly helpless that her husband had to be constantly at her bedside and assist her even to move. During all this time he did not take off his clothes, as his attentions were required to be unceasing and unremitting. The husband then had to neglect all his business to perform this painful duty, and if he had not done it in person, he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case therefore, I think the instruction was justified. * * *

Judgment affirmed. All the Judges concurred.[6]

[6] Future loss of services may be included in the damages. Hadsoll v. Stallebrass, 11 Ad. & El. 301 (1840); Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 59 P. 476 (1899); Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545 (1906); Hopkins v. Atlantic & St. L. Ry., 36 N. H. 9, 72 Am. Dec. 287 (1857); Reagan v. Harlan, 24 Pa. Super. Ct. 27 (1903).

At common law, only damages accruing to the husband before the wife's death could be recovered. Baker v. Bolton, 1 Campb. 493 (1808); Mowry v. Chaney, 43 Iowa, 609 (1876). Contra: Cross v. Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61 (1794). If she was killed instantly by the defendant's tort, the husband could not recover at all. Green v. Hudson River Ry. Co., 2 Abb. Dec. (N. Y.) 277 (1866).

BIGAOUETTE v. PAULET.

Supreme Judicial Court of Massachusetts, 1881. 134 Mass. 123, 45 Am. Rep. 307.

Tort in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society and benefit. Writ dated April 9, 1877. Trial in the Superior Court, before Rockwell, J., who allowed a bill of exceptions, in substance as follows:

The only witnesses were the plaintiff and his wife. The wife testified that the plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under the defendant, and that the parties were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, the defendant told the plaintiff's wife that he would turn her husband away from the factory if she refused to receive the defendant's visits; that on July 5, 1876, the defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and the defendant, and three days afterwards the plaintiff was discharged from the factory by the defendant; that shortly after July 5, 1876, the plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family from the time of the assault up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of a loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for the assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word consortium,—the right to the conjugal fellowship of the wife,

to her company, coöperation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass vi et armis. In regard to the others, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, per quod consortium amisit, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matters of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See Chambers v. Caulfield, 6 East, 244; Wilton v. Webster, 7 C. & P. 198; Yundt v. Hartrunft, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action.

The original and approved form of action is trespass vi et armis, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." Rigaut v. Gallisard, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, Bac. Ab. Trespass, C. 1, and Marriage, F, 2; 2 Chit. Pl. (13th Am. Ed.) 855; Reeve's Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind,—that the corrupting of the body rather than the mind of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will.[7]

Exceptions sustained.

[7] Accord: Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869 (1904); Hirdes v. Ottawa Circuit Judge, 180 Mich. 321, 146 N. W. 646, 52 L. R. A. (N. S.) 373 (1914).

In Smith v. Myers, 52 Neb. 70, 71 N. W. 1006 (1897), the court, by Norval, J., said: "Complaint is made of this instruction, which was given by the court on its own motion: '(6) The jury are instructed that, if you find for the plaintiff, in estimating the injury he has sustained the jury may take into consideration the wounded feelings and affections of the husband, the wrong done to him in his domestic and social relations, the stain and dishonor he has sustained, and the grief and affliction suffered, in consequence of the act complained of, and give damages accordingly.' The elements of damages enumerated in this paragraph of the charge were proper subjects for the consideration of the jury in reaching a verdict, and it is an unfair criticism of this instruction, when read in the light of the remainder of the charge, to say that the court assumed plaintiff had sustained all those different items of damages. If the mere statement of the elements which the jury might consider in fixing the amount of recovery created an impression unfavorable to defendant, he is to blame for having so acted as to cause a judicial investigation of the facts. Plaintiff was not limited in the amount of recovery to such sum as would merely compensate him for loss of services of the wife during the time they were separated. Using the language of Chief Justice Walker in Yundt v. Hartrunft, 41 Ill. 12 [1866]: 'In this class of cases the loss of services may be alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and an-

RINEHART v. BILLS.

Supreme Court of Missouri, 1884. 82 Mo. 534, 52 Am. Rep. 385.

MARTIN, C. On the 26th day of January, 1880, the plaintiff filed a complaint in equity against the defendant. In this complaint another party was originally included as a defendant, but was discharged before trial. The object of the suit was to enjoin the transfer and collection of a certain promissory note in the sum of $550 made by the plaintiff, to enforce its surrender and cancellation, and obtain a judgment for a part payment indorsed upon it. It is alleged in the petition that the note was without consideration, and was obtained by false representations, by threats of suit, and of personal violence. The defendant in his answer denied the allegations of the petition and recited the facts constituting the consideration of the note, which, in his own language, read as follows:

"Defendant, further answering, says: That on or about the 11th day of November, 1879, he learned for the first time that plaintiff, for a long time thereto, to wit, for about eighteen months, then last past, had been making love to his (defendant's) wife, whenever and wherever he could meet her. That he had plied every art and used every device in his power to win her love and esteem, and to alienate and estrange her from her husband. That he had told her at divers times and places, that he loved her deeply, devotedly, madly, and that he could not live without her. That plaintiff had written her love letters on divers occasions; had given her a fine gold finger ring, and desired to leave and abandon his own wife and children, and take defendant's wife and go to a new country where they would not be known, and could marry and live together as man and wife. That plaintiff was rich and would maintain her in luxury and ease, and she could live like a lady, without labor and toil. Defendant, further answering, states that plaintiff by his persistent efforts, finally succeeded in alienating and estranging the love and affections of defendant's wife from defendant, and procured in the manner and by the means aforesaid, her consent to leave and desert her husband and elope with plaintiff."

The answer goes on to recite that she had relented her rash promise to elope with plaintiff, had confessed everything to her husband, and begged to remain with him as his wife under the security of pardon and forgiveness. It is further alleged in substance that the defendant, smarting under the wrongs inflicted upon him by plaintiff, repaired to the plaintiff's residence with his attorney with a view of settling for these wrongs without suit; that in the interview the plaintiff admitted the facts as charged against him, and agreed to pay defendant in liquidation of all damages by him sustained, and in final settlement

guish growing out of the injury.' See Stumm v. Hummel, 39 Iowa, 478 [1874]; Long v. Booe, 106 Ala. 570, 17 So. 716 [1894]; Rice v. Rice, 104 Mich. 371, 62 N. W. 833 [1895]; Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607 [1883]."

thereof, the sum of $600; that he paid down $50 and gave the note in controversy for the remaining $550, payable four months from date; that he afterwards paid $205 on account of the note, which payment was indorsed on the same. The answer concludes with a prayer that the injunction be dissolved and judgment be rendered in defendant's favor, in the amount of the note remaining unpaid, which is stated to be $345 with interest.

The plaintiff interposed a demurrer to this answer, which was overruled. The case was then tried by the court without the intervention of a jury. The court found the issues in favor of defendant, declaring in its decree that the matters and allegations in plaintiff's petition are untrue and not sustained by the evidence. The injunction was dissolved, and the sum of $40.05 was assessed as damages on the injunction bond against the plaintiff and his sureties. It was also adjudged that defendant recover of plaintiff the balance due on the note sought to be enjoined. The bill of exceptions does not contain the evidence, but merely recites that evidence was submitted by both parties tending to prove the allegations of their pleadings.

Only one question is presented to us, in the record, for determination. That question involves the sufficiency of the defense, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that, as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him, for which an action lies, and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained upon either principle or authority. The injury to defendant consists in the alienation of his wife's affections with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable repentance. The alienation of the wife's affections for which the law gives redress may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists, that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation. Schouler's Dom. Rel. 57; Cooley on Torts, 224; Hoard v. Peck, 56 Barb. (N. Y.) 202; Heermance v. James, 47 Barb. (N. Y.) 120.

I think it would be difficult to regard it in any other light, in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It also admits the fact of actual estrangement and alienation which constitutes the essence of the offense. Everything which follows afterwards can be only in the nature of aggrava-

tion, mitigation, or reparation of the wrong inflicted upon the sanctity of the defendant's home.

I may add here, by way of allusion to the consideration of the note, that the compromise of a doubtful claim, asserted in good faith, furnishes a valuable consideration to support a promise. 1 Par. Cont. (6th Ed.) 438, § 4.

The judgment is affirmed. All concur.[8]

HAYNES v. NOWLIN.

Supreme Court of Indiana, 1891. 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213.

Action by Leah Haynes against Flora Nowlin. Plaintiff appeals from a judgment entered on an order sustaining a demurrer to the complaint. Reversed.

ELLIOTT, C. J. The question which this record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her, and alienates his affections? It was the boast of the common law that "there is no right without a remedy," and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the baron and feme were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support; but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To those cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in

[8] Contra: Houghton v. Rice, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351 (1899); Gahagan v. Church, 239 Mass. 558, 132 N. E. 357 (1921).

See note, 9 Cornell L. Q. 220.

such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law (and generally very justly) is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive, rights to the baron, and so few, and such narrow ones, to the feme, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress. The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the baron may recover from one who entices away the feme, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17; Lynch v. Knight, 9 H. L. Cas. 577; Breiman v. Paasch, 7 Abb. N. C. 249; Baker v. Baker, 16 Ab. N. C. 293; Jaynes v. Jaynes, 39 Hun. 40; Warner v. Miller, 17 Abb. N. C. 221; Churchill v. Lewis, 17 Abb. N. C. 226; Foot v. Card, 58 Conn. 1, 18 A. 1027. The decisions to which we have referred, and the authorities they adduce, prove beyond debate that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest; and upon reason and principle she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her hus-

band were one, for from this fiction comes the stiff, unreasonable rule that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better-considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of Logan v. Logan, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered; not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should overrule it, for, since the cause of action there declared invalid arose, radical changes have been made by statute. The rights as well as the obligations of married women have been greatly enlarged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception." Rosa v. Prather, 103 Ind. 191, 2 N. E. 575; Arnold v. Engleman, 103 Ind. 512–514, 3 N. E. 238; McLead v. Insurance Co., 107 Ind. 394, 8 N. E. 230; City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551; Bennett v. Mattingly, 110 Ind. 197, 10 N. E. 299, and 11 N. E. 792; Strong v. Makeever, 102 Ind. 578, 1 N. E. 502, and 4 N. E. 11; Lane v. Schlemmer, 114 Ind. 296–301, 15 N. E. 454; Phelps v. Smith, 116 Ind. 387–402, 17 N. E. 602, and 19 N. E. 156; Young v. McFadden, 125 Ind. 254, 25 N. E. 284; Miller v. Shields, 124 Ind. 166, 24 N. E. 670. It seems to us very clear that, in view of the fact that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her. Every radical, express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this

doctrine that, when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband. In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support, and to them we add Seaver v. Adams (N. H.) 19 A. 776; Mehrhoff v. Mehrhoff, 26 F. 13; Westlake v. Westlake, 34 Ohio St. 621; Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99. See, also, Duffies v. Duffies (Wis.) 45 N. W. 522.

The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away or corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." Bigelow, Torts, 153. Judge Cooley says: "We see no reason why such an action should not be supported where, by statute, the wife is allowed for her own benefit to sue for personal wrongs suffered by her." Cooley, Torts, 228, note. Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common-law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes, as they are shaped in many of our states, she can hold property at law, bring suits to secure it, and maintain actions for tort in her own name, without any interference from her husband; so that, where a statute of this sort prevails, she has her action against the seducer of her husband, who has thus wrongfully deprived her of his society and care." 1 Bish. Mar. & Div. § 1358. Judgment reversed.[9]

[9] The great weight of authority is in accord with this case. See, e. g., Woodson v. Bailey, 210 Ala. 568, 98 So. 809 (1924); Rott v. Goehring, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643 (1916).

Contra: Hodge v. Wetzler, 69 N. J. Law, 490, 55 A. 49 (1903); Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79 (1890). This rule has been changed by statute in Wisconsin. See Wait v. Pierce, 192 Wis. 202, 209 N. W. 475, 210 N. W. 822, 48 A. L. R. 276 (1926), where the court comments on the effect of the change, by statute, of "natural and unchangeable conditions."

If the alienation of affections was accompanied by criminal conversation, the wife may sue, although the defendant was seduced by the plaintiff's husband, and was not the aggressor. Miller v. Pearce, 86 Vt. 322, 85 A. 620, 43 L. R. A. (N. S.) 332 (1912).

LOPER v. ASKIN.

Supreme Court, Appellate Division, Second Department, 1917. 178 App. Div. 163, 164 N. Y. S. 1036.

Action by Jessie Loper, for alienation of her husband's affection, against Lucy J. Askin. From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted on reargument of appeal.

PUTNAM, J. In September, 1914, plaintiff had separated from her husband, Frank Loper, who kept a livery stable and doctored horses in the village of Patchogue, L. I. This action was begun December 29, 1915, against Mrs. Askin, who had a hotel at Medford, L. I. At the conclusion of plaintiff's case, defendant moved for a dismissal, and, having excepted to such refusal to dismiss, offered no evidence for the defense. The jury rendered a verdict for $2,250.

Plaintiff's testimony failed to establish her case. The action for enticing away one from his contract relations (even those of master and apprentice) requires proof that defendant knew of the relations he was breaking up. Stuart v. Simpson, 1 Wend. 376. Hence this complaint properly charged defendant with "contriving and willfully intending to injure the plaintiff, and to deprive her of the comfort, society, aid, assistance and consortion of the husband." This allegation seems essential. Webber v. Benbow, 211 Mass. 366, 97 N. E. 758. Plaintiff must make out wrongful and willful intent to engage the husband's affection and thereby to seduce him from fidelity to his wife. Whitman v. Egbert, 27 App. Div. 374, 50 N. Y. S. 3. Facts must also appear from which it may be inferred that the woman defendant was the pursuer, not merely the pursued. She does not become liable because she may have accepted the admiration of plaintiff's husband. Buchanan v. Foster, 23 App. Div. 542, 48 N. Y. S. 732. See Churchill v. Lewis, 17 Abb. N. C. 226.

As the wrong involves moral turpitude, no presumption of guilt can be indulged, unless the facts cannot be otherwise reconciled. Buchanan v. Foster, supra.

Defendant lived in Medford, some four miles from Patchogue, plaintiff's home. The record is destitute of proof of scienter. If the incident of plaintiff's sudden attack on defendant at the Mineola Fair in the fall of 1915 might give rise to an inference that the assailing woman was the wife of defendant's escort, which may be doubtful, still there is no evidence of acts of association between defendant and Loper subsequent to that date.

When the plaintiff rested, her cause of action was not made out. Hence no inference could be drawn because defendant was not sworn. Defendant is not called upon to introduce evidence to contradict or explain facts which were insufficient to establish any liability against her. Shotwell v. Dixon, 163 N. Y. 43, 45, 57 N. E. 178.

The judgment and order should therefore be reversed, and a new trial granted; costs to abide the event.[10]

JENKS, P. J., and BLACKMAR, J., concur. MILLS and RICH, JJ., dissent.

OAKMAN v. BELDEN et al.

Supreme Judicial Court of Maine, 1900. 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396.

SAVAGE, J. Action on the case by husband for the alienation of the affections of his wife by her parents, who are the defendants. The plaintiff obtained a verdict.

The plaintiff claims that the defendants unjustifiably interfered in his domestic affairs, and with intent to break up the harmonious and affectionate relations existing between him and his wife, wrongfully enticed, advised and persuaded her to leave him, which she did. The defendants, on the other hand, deny that they persuaded their daughter to leave her husband, and they claim, in addition, that such was the daughter's age and condition of health, and such was the plaintiff's cruel and abusive conduct towards her, endangering her health and destroying her peace of mind, they were justified in doing all that the evidence for the plaintiff tends to show that they did, even assuming it to be true. It is admitted that the marriage was clandestine, and against the will of the defendants, and that the wife returned to their home not later than three weeks after the marriage, and has since remained there.

The jury were instructed that if the separation of the plaintiff's wife from him "was the result of the active interference of the parents," if they "put in their oar," and if "the wife would have gone back if it had not been for their interference, either by threats, persuasions or arguments, * * * they have done him a wrong, and he is entitled to compensation for that wrong." To this instruction the defendants except, and we are now to inquire whether this instruction was correct, in view of the evidence and the contentions of the parties.

Whoever wrongfully interferes in the relations of husband and wife,

10 Though a wife has divorced her husband for cruelty, the divorce is not a bar to a suit by the husband against a third person for alienating her affections before the divorce. Lundstrom v. Nelson, 114 Kan. 324, 219 P. 509 (1923); Pollard v. Ward, 289 Mo. 275, 233 S. W. 14, 20 A. L. R. 936 (1921), with a note on "Decree of Divorce or Separation as Res Adjudicata or Basis of Estoppel or Evidence in Action for Alienation of Affections or Criminal Conversation."

In an action for alienation of affections, punitive damages may be assessed, and the wealth of defendant may be shown. Overton v. Overton, 121 Okl. 1, 246 P. 1095 (1926).

The extent of plaintiff's affection for the alienated spouse will affect the amount of damages, Okrent v. Raffa, 206 Ky. 211, 266 S. W. 1079 (1924); Madison v. Neuberger, 130 Misc. 650, 224 N. Y. S. 461 (1927); 41 Harv. L. Rev. 535, note; and the extent to which the other spouse returned that affection before the defendant interfered will affect the amount of damages, Luick v. Arends, 21 N. D. 614, 132 N. W. 353 (1911); Button v. Knight, 95 Vt. 381, 115 A. 499 (1921).

and entices the wife to leave the husband, is liable to him in damages. While a stranger may, without liability, harbor a wife who has left her husband, he may not persuade her to leave him, or not to return to him. Though she may have just grounds for a separation, yet she may choose to return, and a stranger has no right to intermeddle, and if he does so voluntarily, he must answer the consequences. Modisett v. McPike, 74 Mo. 636. But it is universally conceded that a parent stands on different ground. Though the wife has gone out from the parental home, and has joined her husband "for better, for worse," and though she owes to him marital allegiance, and he possesses the first and the superior right to her affection and comfort and society, it is nevertheless true that the parental relation is not ended, nor has parental affection and duty ended. A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct towards her may be such as to endanger health, and entirely destroy peace and comfort, so that she may properly leave him. In such case, to whom shall she fly, if not to her parents? And from whom shall she seek advice if not from her parents? And such advice may, we think, be enforced by reasonable arguments. A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments, drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

This conclusion is supported by the authorities. Chancellor Kent in Hutcheson v. Peck, 5 Johns. (N. Y.) 196, said: "A father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. * * * I should require, therefore, more proof to sustain the action against the father, than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be

presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The quo animo ought then, in this case, to have been made the test of inquiry and the rule of decision."

In the well-considered opinion in Bennett v. Smith, 21 Barb. (N. Y.) 439, Strong, J., for the court, said: "When the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought, and I have no doubt have the right, not only to receive her into, and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. * * * And the same doctrine is applicable, in my judgment, to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives." White v. Ross, 47 Mich. 172, 10 N. W. 188; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

It was held in Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791, that "if the motive of the intervening person (a parent) was pure and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed." "Much will be forgiven the parents of a wife," the court say, "who honestly interfere in her behalf, though the interference was wholly unnecessary, and may have been detrimental to her interest and happiness as well as that of her husband; still when the motive was, not the protection of the wife, but hatred and ill will of the husband, it is no answer to his action that the offenders were his wife's parents." Rabe v. Hanna, 5 Ham. (Ohio) 530; Gernerd v. Gernerd, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784.

Some authorities seem to hold that the intent alone of the parent is decisive. In a recent Mississippi case it is said: "The question must always be, was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice, and in his action, he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have twelve men pass upon the integrity of his intentions." Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623.

"The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband. * * *

If, however, the interference is by the parents of the wife, or an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible." Cooley on Torts (2d Ed.) p. 264.

After citing with approval the words of Chancellor Kent in Hutcheson v. Peck, supra, Mr. Schouler says: "But this does not justify even a parent in hostile interference against the husband; and the father must give up his daughter whenever she wishes to return, unless the proper tribunal has decided otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to persuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point rather than the justice of the interference." Schouler's Domestic Relations (3d Ed.) § 41.

In the instruction complained of in the case at bar, the jury were told in substance that if the separation of plaintiff's wife from him was the result of the active interference of the defendants, either by threats, persuasion, or arguments, then the defendants were liable. This instruction, unqualified as it was, was erroneous, and placed upon the defendants a much more grievous burden of justification than parents in such cases ought to be compelled to bear.

It is unnecessary to consider the remaining exceptions further than to say that we perceive no error in the rulings complained of.

Exceptions sustained.[11]

HARTPENCE v. ROGERS.

Supreme Court of Missouri, 1898. 143 Mo. 623, 45 S. W. 650.

[This is an action for damages for alienating the affections of the plaintiff's wife and wrongfully causing her to abandon him. The testimony on behalf of the plaintiff tended to show a systematic and constant effort by the defendant to win the affections of the plaintiff's wife, to break the ties between her and her husband and cause her to abandon him. This testimony was substantially uncontradicted by the defendant. There was a verdict for the plaintiff. The defendant appealed.]

WILLIAMS, J. [after passing upon certain rulings upon evidence, continued:]

2. The first, third and fourth instructions for plaintiff contained a direction to the jury to find for him, if they believed from the evidence

[11] Cases in accord are legion. See, for example, Thomas v. Lang, 135 Wash. 675, 238 P. 626 (1925).

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that defendant intentionally persuaded plaintiff's wife to separate and remain apart from him. These instructions contain other matters, which will be noticed later, but all of them include in substance the above direction. They are almost exact copies of those approved in Modisett v. McPike, 74 Mo. 636. It is argued by appellant that the jury, by these instructions, was authorized to return a verdict against defendant, upon the proof alone of the fact that he persuaded plaintiff's wife to leave him and separate herself from him, without reference to defendant's motives in so doing. It is said that a wife may have a good cause to abandon her husband and that a third party, in no manner related to her, may, from the best motive, persuade her to do so. This court answered a similar contention in the following language: "The wife may have a just cause for separation or divorce, but she may elect to abide by her situation and remain with her husband nevertheless. If she chooses to do so, no stranger has the right to intermeddle with the domestic and marital relations of husband and wife and if he voluntarily does so, he is amenable for the consequences. * * * No one unasked, especially a stranger, has the right to volunteer his advice or protection, and if he does so he is amenable. 'It is one thing to actively promote domestic discord, but quite another thing to harbor, from motives of kindness and humanity, one who seeks shelter from the oppression of her own lawful protector.' It has been well said that 'such conduct, whatever the motive, is exceedingly perilous on the part of a stranger, generally open to misconstruction and never to be encouraged.'" Modisett v. McPike, 74 Mo. 646.

The principle announced in the instructions complained of, and in almost the same language, met with the approbation of the entire court in the case cited. We have no disposition to depart from that ruling. It is a safe rule to lay down, as this court has done, that a husband makes a prima facie case against a stranger when he shows that such stranger voluntarily and unasked intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence, as in this case, to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established, and the jury were properly so instructed. Modisett v. McPike, supra. The issues submitted in the instructions were included in the allegations of the petition. The fact that more was alleged than it was necessary for plaintiff to prove, in order to entitle him to a verdict, could not prevent his recovery, where he averred and proved enough to make out his case. Campbell v. Railroad, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Radcliffe v. Railroad, 90 Mo. 127, 2 S. W. 277. * * *

Judgment affirmed.[12]

[12] Accord: Boland v. Stanley, 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114 (1909). In Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L. R. A. (N. S.) 581 (1912), the plaintiff maintained an action of deceit against the defendant,

TASKER v. STANLEY.

TASKER v. TASKER.

Supreme Judicial Court of Massachusetts, 1891. 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

HOLMES, J. These are actions for procuring and enticing the plaintiff's wife to live separately from him. They are not actions of the type of Lynch v. Knight, 9 H. L. Cas. 577, brought for a slander in consequence of which his wife left him, but they are brought for persuasions which may have been based wholly upon the truth. That is all that is alleged in the declarations, and, so far as appears from the bill of exceptions, there was no evidence offered that the defendants spoke any falsehoods, or that their conduct was unlawful for any other reason than its tendency to produce a separation. Winsmore v. Greenbank, Willes, 577, 583.

True statements and honest advice would have done no harm but for the subsequent act of the wife, an independent and responsible person. The defendants had a right to deny their intent to bring about that act. See Robbins v. Fletcher, 101 Mass. 115, 117; Snow v. Paine, 114 Mass. 520; Commonwealth v. Damon, 136 Mass. 441, 449. And probably they would not be liable for it unless they intended it. See Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Hastings v. Stetson, 126 Mass. 329, 30 Am. Dec. 683; Jones v. Goodwillie, 143 Mass. 281, 9 N. E. 639; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49, 15 N. E. 84, 4 Am. St. Rep. 279; Elmer v. Fessenden, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724; Vicars v. Wilcocks, 8 East, 1, 3; Ward v. Weeks, 7 Bing. 211, 215; Radley v. London & Northwestern Railway, 1 App. Cas. 754, 759; Milwaukee & St. Paul Railway v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Cuff v. Newark & New York Railroad, 35 N. J. Law, 17, 30, 10 Am. Rep. 205 et seq.

If the defendants did intend to induce a separation, they had a right to show that their advice was given honestly, with a view to the welfare of both parties. For a married woman to leave her husband without cause is not a great crime. It is legal if with his consent, and if against his will it is only illegal in the sense that, if she keeps away from him for three years, he may get a divorce. A married woman must be supposed to be capable of receiving advice to separate from her husband without losing her reason or responsibility. Considering the present state of the law as to the act advised, (an important consideration, State v. Goode, 1 Hawks [N. C.] 463, 464,) and as to the person to whom the advice is given, it is proper to allow a larger privilege than in the case of false statements. Good intentions are no excuse for spreading slan-

who had made intentionally false representations to her about her husband, in consequence of which she had treated him cruelly and caused him to desert her. See Lillegren v. William J. Burns International Detective Agency, 135 Minn. 60, 160 N. W. 203, L. R. A. 1917B, 679 (1916), contra, where the misrepresentation was due to negligence.

ders. But in order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed, we think that it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives; and so are all the cases. Walker v. Cronin, 107 Mass. 555, 564, 566; Barnes v. Allen, 1 Abb. Dec. (N. Y.) 111; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Modisett v. McPike, 74 Mo. 636, 648; Rinehart v. Bills, 82 Mo. 534, 537, 52 Am. Rep. 385; Pollock, Torts (2d Ed.) 479, 480; Bowen v. Hall, 6 Q. B. D. 333, 338, 344; Lumley v. Gye, 2 El. & Bl. 216. * * *

Exceptions overruled.[13]

KROESSIN v. KELLER.

Supreme Court of Minnesota, 1895. 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533.

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the

[13] Accord: Geronimi v. Brunelle, 214 Mass. 492, 102 N. E. 67, 46 L. R. A. (N. S.) 465 (1913).

principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases, determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon or send her away. Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan, and similar to our own, is Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add Price v. Price, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79. But we need not decide, as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597, and Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as

directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with little hope of redress for themselves." We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to Gen. St. 1894, § 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

Order reversed.

OPPENHEIM v. KRIDEL.

Court of Appeals of New York, 1923. 236 N. Y. 156, 140 N. E. 227, 28 A. L. R. 320.

Action by Jennie M. Oppenheim against Martha Kridel. From a judgment entered on an order of the Appellate Division (204 App. Div. 305, 198 N. Y. S. 157), reversing judgment for plaintiff on a verdict, and directing a dismissal of the complaint, plaintiff appeals. Judgment of Appellate Division modified, granting a new trial, and, as so modified, affirmed.

CRANE, J. Can a wife maintain an action for criminal conversation as well as a husband? This is the question presented by this appeal.

The plaintiff and her husband were married in 1884 and had one child, who was married in 1909. They lived together in the same house or apartment until 1917. It can be gathered from the evidence that in 1913 the parties had ceased to live together as husband and wife. It is about this time that the defendant, a widow with children, entered into the lives of these two parties. From 1913 until a final separation in 1917, the husband seems to have lost his love and affection for his wife. During this time he was seeing the defendant with more or less frequency. Intimacy increased with the years until in January, 1919, he and the defendant were found in his apartment in New York City

under such circumstances as to leave no doubt that they had committed adultery. The fact is conceded.

The plaintiff, Mrs. Jennie M. Oppenheim, thereupon brought this action against Mrs. Martha Kridel, the guilty party, alleging in her complaint:

"That the defendant, well knowing said Myron H. Oppenheim to be the plaintiff's husband, and maliciously and willfully intending to injure the plaintiff and deprive her of the comfort, society, aid, assistance, and support of her said husband, and to alienate and destroy his affection for her, heretofore, and on or about the 12th day of January, 1919, and on divers other days and times during the last four years last past, and before the commencement of this action, at the premises No. 207 West Fifty-Sixth street, borough of Manhattan, city of New York, and at divers other premises and places, wrongfully and wickedly, and without the privity or connivance of plaintiff, debauched and carnally knew the said Myron H. Oppenheim, by means whereof the affection of the said Myron H. Oppenheim for the said plaintiff was wholly alienated and destroyed, and by reason of the premises the plaintiff has wholly lost the affection, comfort, society, aid, assistance, and support of her said husband."

On the trial, the justice refused to consider the case as one for alienation of affections, and submitted it to the jury solely as an action for criminal conversation. He charged:

"You are not to concern yourselves with any question as to whether or not the defendant alienated the affections of plaintiff's husband. There is now no such question in this case."

He further said:

"It is only necessary for the plaintiff to prove her marriage and the criminal intercourse between her husband and the defendant, and that such criminal intercourse was without her consent."

The jury, however, were permitted to consider the loss of the husband's affections and his society and the mental anguish and disgrace sustained by the plaintiff, if any, on the question of damages.

On appeal the judgment for the plaintiff, entered upon the verdict of a jury in her favor, was reversed by a divided court, and the complaint dismissed under a ruling that an action for criminal conversation could not be maintained in this state by a wife. We have arrived at the conclusion, after a full review of the authorities, that, whatever may have been the rights of the wife in this particular under ancient law, there is no reason or law against her maintaining such an action to-day so long as the husband may do so.

At common law the wife had no cause of action against a woman for alienating the affections of her husband or for the act of adultery committed with him known by the technical name of an action for criminal conversation. The husband could bring such action against a man for enticing away the affections of his wife or for committing adultery with her. Some of the reasons assigned as the basis of the action by

the husband for criminal conversation sound somewhat strange in our ears to-day. The gist of the action was the possibility that by the infidelity of a wife the husband might be called upon to support illegitimate children, or the legitimacy of his own offspring be cast into doubt. The husband, so it was said, had a property in the body, and a right to the personal enjoyment, of his wife, for the invasion of which right the law permitted him to sue as husband. The wrongful act was treated as an actual trespass upon the marital rights of the husband, although the consequent injury to him was on account of the corruption of the body and mind of the wife. Tinker v. Colwell, 193 U. S. 473–483, 24 S. Ct. 505, 48 L. Ed. 754. These old authorities and reasons have carried the respondent to the logical conclusion which he states in his brief as follows:

"The husband's cause of action is based upon his proprietary right in the person of his wife. * * * The assertion that husband and wife are now equal in the eyes of the law has no bearing on the cause of action for criminal conversation, which was predicated upon the possessory right of the superior being in the body of the inferior."

The basis for some of these apparently harsh reasons mentioned in the early common law arose out of forms of action and difficulties in procedure. They were written into the law at a time when forms of action were rigid and limited, and fictitious reasons were sought to justify relief under existing, but inappropriate, forms. The adultery was treated as an assault upon the person of the husband. This search for a remedy was referred to as follows:

"The assault vi et armis is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children." Tinker v. Colwell, 193 U. S. 473, 481, 24 S. Ct. 505, 506 (48 L. Ed. 754).

Barring the fictions which apply only to procedure, whatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed with his wife exist to-day in behalf of the woman for a like illegal act committed with her husband. If he had feelings and honor which were hurt by such improper conduct, who will say to-day that she has not the same, perhaps even a keener sense of the wrong done to her and to the home? If he considered it a defilement of the marriage bed, why should not she view it in the same light? The statement that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic, unless used in a refined sense worthy of the times, and which give to the wife the same interest in her husband. The fiction of assault, whereby courts were given jurisdiction, has long since vanished, except for historical interest. The danger of doubt being thrown upon the legitimacy of the children, which seems to be the principal

reason assigned in all the authorities for the protection of the husband and the maintenance of the action by him, may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate. Science to-day teaches us the dire consequences which sometimes follow promiscuous intercourse by a man. It is common knowledge that the sins of the father are sometimes visited, not only upon the children, but upon the wife, in the resultant diseases contracted through breaches of the marriage contract. The husband must not have discredit thrown upon the legitimacy of his children. The wife should have no doubt about the health and cleanliness of her husband or of her offspring. Legitimacy is important. Children of sound mind and body are equally as important.

It is said in this case that the affections of the husband and wife had already been alienated, and that the defendant could cause the wife no harm by her illegal relations with the husband, as the husband had ceased to live with the wife and his love for her had already vanished. Such a proposition loses sight of the fact that the parties were still husband and wife, the marriage bonds had not been dissolved, and that there was always the possibility of reconciliation rendered perhaps too remote by the defendant's illicit relationship.

So far as I can see, there is no sound and legitimate reason for denying a cause of action for criminal conversation to the wife while giving it to the husband. Surely she is as much interested as the husband in maintaining the home and wholesome, clean, and affectionate relationships. Her feelings must be as sensitive as his toward the intruder, and it would be mere willful blindness on the part of the courts to ignore these facts. Both the courts of this state and the statutes have recognized this change in the status, rights, and privileges of a married woman. As stated before, the common law gave a married woman no action either for alienation of affections or for criminal conversation. Yet this court has recognized that under the statutes giving her the power to maintain actions in her own name she may now sue another woman for alienating the affections of her husband. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553. It is true that this case was not decided upon the theory that the Married Women's Acts of 1860 (Laws 1860, c. 90) and of 1862 (Laws 1862, c. 162), permitting her to sue in her own name, gave her a cause of action which she did not previously possess. The question put and answered by that case was the following:

"Can it be sustained upon the theory that the right of action belongs to the wife according to the general principles of the common law and that she may now maintain it, being permitted to sue in her own name?" 116 N. Y. 584, 589, 23 N. E. 17, 18 (6 L. R. A. 553).

In answering this question in the affirmative, this court proceeded upon a theory that the right always existed in the woman at common law, but that she could not enforce it by reason of the rules of practice which prohibited her from maintaining actions, and which also gave to

the husband her property. This was pure theory, as it is difficult to understand how any substantial right could exist at common law for which there was no remedy afforded. The fact is the Bennett Case established the rule that, as the husband could sue for the alienation of his wife's affections, there was no reason why the wife should not also maintain such an action under our forms of procedure, when the results were as injurious to her from the alienation of her husband's affections as they would be to the husband by the alienation of her affections. The question was again asked in the opinion in that case:

"Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?"

And the court again answered by these general reflections upon the facts as they existed and were known by everybody to exist:

"The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that 'the law will never suffer an injury and a damage without a remedy' apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?" 116 N. Y. 584, 590, 23 N. E. 17 (6 L. R. A. 553).

What is here said about "natural right" and the "flexibility of the common law" is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife? The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law

is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation. In Colwell v. Tinker, 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587, this court said, regarding an action for criminal conversation brought by a husband:

"While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and to a certain extent disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed, and he is subjected to great mental suffering." 169 N. Y. 531, 536, 62 N. E. 668, 670 (58 L. R. A. 765, 98 Am. St. Rep. 587).

Are we prepared to say that humiliation, disgrace, dishonor and mental suffering afflict a husband but do not afflict a wife? The law is not so foolish. The United States Supreme Court in this same case (193 U. S. 473, 24 S. Ct. 505, 48 L. Ed. 754) said:

"Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right." 193 U. S. 484, 24 S. Ct. 507 (48 L. Ed. 754).

With the exception of the begetting of children, all these reasons apply equally to the wife. As I have above stated, his interest in the begetting of his own children is equalized by the wife's interest in having a clean man and healthy children. In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation, except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights.

Our statutes have also been touched with this spirit of advance, so that we now find in section 57 of the Domestic Relations Law (Consol. Laws, c. 14) the following:

"A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried."

Section 37-a of the General Construction Law (Consol. Laws, c. 22) defines "personal injury" as including criminal conversation.

Adultery is now a crime. Section 100 of the Penal Law (Consol. Laws, c. 40) says:

"Adultery is the sexual intercourse of two persons, either of whom is married to a third person."

There is no distinction here in the criminal law between husband and wife. Either may be guilty of the crime. If the offense committed by the defendant in this case be considered so serious in its consequences as to be condemned by the Penal Law and made a crime, can it be said that the wife of the husband with whom the act has been committed has suffered no injury, or if injured that the law will afford her no relief in a civil action, although giving it to the husband under similar circumstances?

When we concede that a wife may maintain an action for alienating the affections of her husband, we virtually admit that she may also maintain an action for criminal conversation. While adultery is the sole basis of the latter, it is almost universally the chief element of evidence in the former. Other states have equalized these rights between husband and wife and given to her an action for adultery when the husband was permitted to sue for like cause. In Nolin v. Pearson, 191 Mass. 283, 286, 77 N. E. 890, 891, it was said:

"When approached in the light of an abstract right arising from and incidental to the civil institution known as marriage, but which as between the parties is treated as a contract, and the consequent conjugal relation, there is great inherent difficulty in sustaining the proposition that while the husband can demand the right of exclusive marital aid and affection, the wife has no equivalent right, or that a sound public policy requires that she shall remain faithful to her marriage obligations, although he is at liberty to enter upon a course of conduct which may render further marital relations on her part impossible. * * * We are aware that in a few jurisdictions either from the construction of enabling statutes, which are held to confer upon a married woman only the right to sue for injuries to her person or for damages to her property, or for reasons of public policy, a cause of action for criminal conversation with her husband has been denied. * * * But the conclusion to which we have come is supported by the great weight of American authority."

In Turner v. Heavrin, 182 Ky. 65, 67, 206 S. W. 23, 4 A. L. R. 562, the court said, in maintaining an action by the wife for criminal conversation:

"A fundamental right which flows from the relation of marriage, and one which the well-being of society requires should be maintained inviolate, is that of exclusive marital intercourse which each acquires with the other. From this it follows that whenever either party commits adultery, he or she commits a trespass upon the rights of the other."

See to the same effect Rott v. Goehring, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 794; Parker v. Newman,

200 Ala. 103, 75 So. 479; Dodge v. Rush, 28 App. D. C. 149. In this latter case it was said (28 App. D. C. 152, 153):

"The underlying ground of the common-law rule of discrimination between husband and wife in respect of this right, namely, the incapacity of the wife to maintain a separate action for a tort, has been swept away by the modern legislation that has so generally relieved the wife of the ordinary disabilities of coverture. * * * While the injurious consequences of a wife's adultery may be more far-reaching because of probable difficulties and embarrassments in respect of the legitimacy of children, her conjugal rights are in principle the same, substantially, as his. Whatever the ancient doctrine may have been, modern morals and law recognize the equal obligation and right of husband and wife. Nor can the consent of either to his or her defilement affect the right of action of the injured spouse against the other wrongdoer."

Section 349 of the Civil Practice Act does not express any legislative intent regarding this question. That provision simply declares a rule of evidence.

It is no answer to the wife's claim in this action to say that in other jurisdictions the action for criminal conversation has been altogether abolished. We are here dealing with the law of the state of New York. Such an action still exists and we are merely holding that what is law for the man is also law for the woman.

Neither is it an objection to say that a distinction still exists at law between the husband and wife in that the husband is given a cause of action for a personal injury to the wife resulting in the loss of her services, when a like action is not given to the wife for an injury to the husband. The reason for this rule is that the wife at law is supposed to render services in and about the home and in caring for the children. It is because there is no reason for denying the woman the right to maintain the action for criminal conversation when the action is given to the husband that we come to our present conclusion in this case.

For the reasons here stated, the judgment of the Appellate Division must be modified, by granting a new trial, and, as so modified, affirmed, with costs in this court and Appellate Division to abide the event.

HISCOCK, C. J., and HOGAN, CARDOZO, and POUND, JJ., concur.[14]

McLAUGHLIN, J., dissents, on ground that decision about to be made changes the law of the state in a manner which should be effected by legislation.

ANDREWS, J., absent.

Judgment accordingly.

[14] The great weight of authority is in accord. See 28 A. L. R. 327.
Punitive damages may be awarded, and the wealth of the defendant may be shown. Hargraves v. Ballou, 47 R. I. 186, 131 A. 643 (1926).

KELLEY v. NEW YORK, N. H. & H. R. R. CO.

Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397.

Tort, to recover consequential damages arising from personal injuries to the plaintiff's wife, Mary J. Kelley, occasioned by the defendant's negligence. Trial in the Superior Court, before Dewey, J., who allowed a bill of exceptions, in substance as follows:

This action was tried at the same time with an action brought by the plaintiff's wife to recover for injuries which she herself had suffered.[15]

There was evidence tending to show that on October 23, 1894, the plaintiff's wife, while a passenger on a train of the defendant, was injured; and the defendant admitted that her injuries were caused by the negligence of its servants, and that she was at the time in the exercise of due care.

There was also evidence tending to show that the plaintiff's wife, prior to the accident, had been in good health, and had done the housework, cooking, and washing in the plaintiff's household, and had taken the entire care of two children; that in the accident referred to she had suffered a fractured shoulder blade, an injury to her womb causing a retroversion and pain for some time, and numerous severe bruises; that after the injury she had returned to the plaintiff's home, and for five or six weeks had had one arm bandaged, and had been unable for a considerable length of time to do any work about the plaintiff's house, and because of her injuries had been compelled to wean her child, which she was then nursing; that her capacity to work was permanently impaired, and she had been made irritable, pallid, thin, and weak; and that since the accident she had continued to live with the plaintiff, and on October 21, 1895, had borne him a child; and there was no evidence, other than reasonable inferences from the foregoing facts, that any change had occurred in their relations toward one another as husband and wife. There was further evidence that the plaintiff had incurred expenses for medical attendance, nursing, and medicine for his wife, to the amount of over $1,000.

At the close of the evidence, the defendant requested the judge to rule as follows:

"1. Upon all the evidence the plaintiff cannot recover.

"2. The division of the rights to recover, which by law are made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and the damages which are to be divided between the husband and the wife should not in the aggregate

15 There is a statute in Pennsylvania requiring the husband and wife to join in such a suit, and making a recovery by one a bar to the other. See Loughrey v. Pennsylvania R. Co., 284 Pa. 267, 131 A. 260 (1925).

exceed the damages which the wife, if unmarried, would be entitled to recover."

The judge declined to give the first ruling requested, but gave the second, with the qualification that one additional element should be considered, namely, the loss of consortium by the husband; and the defendant excepted.

The judge also instructed the jury that, although the wife's time and capacity to earn were her own, yet there was a residuum to which the husband was entitled which could best be defined by the word consortium, meaning fellowship, society, or communion, for the loss of which he alone was entitled to recover; and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of $616; and the defendant alleged exceptions.

ALLEN, J. In Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss or loss of service.

The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover, which by law is made between the husband and the wife, does not in any sense increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not in the aggregate exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or at least that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action.

It might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled; but in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it.

By the common law it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her, by medical or surgical malpractice, or by other negligence. Hyde v. Scyssor, Cro. Jac.

538; Guy v. Lusy, 2 Rol. R. 51; Russell v. Corne, 2 Ld. Raym. 1031; Dix v. Brookes, 1 Stra. 61; Smith v. Hixon, 2 Stra. 977; 2 Rol. Abr. Trespass, (Y) 16, p. 556; Hale's Anal. of Law, 96; 3 Bl. Com. 140; 1 Chit. Pl. (7th Ed.) 83; Yelv. (Met. Ed.) 89; Baker v. Bolton, 1 Camp. 493; Carey v. Burkshire Railroad, 1 Cush. (Mass.) 475, 478, 48 Am. Dec. 616; Barnes v. Hurd, 11 Mass. 59; Laughlin v. Eaton, 54 Me. 156; Hopkins v. St. Lawrence Railroad Co., 36 N. H. 9, 14, 72 Am. Dec. 287; Lewis v. Babcock, 18 Johns. (N. Y.) 443; Matteson v. New York Central Railroad Co., 35 N. Y. 487, 91 Am. Dec. 67; Jones v. Utica & Black River Railroad Co., 40 Hun, 349 (a case much like the present); Berger v. Jacobs, 21 Mich. 215; Hyatt v. Adams, 16 Mich. 180; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Nixon v. Ludlam, 50 Ill. App. 273; Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; Mowry v. Chaney, 43 Iowa, 609; Smith v. City of St. Joseph, 55 Mo. 456, 17 Am. Rep. 660.

The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this Commonwealth increasing the rights of married women. Harmon v. Old Colony Railroad Co., 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499. But there has been no substantial change in the statutes upon this subject since the decision in Bigaouette v. Paulet. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired. Butler v. Ives, 139 Mass. 202, 29 N. E. 654. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain different duties and obligations towards each other, in sickness and health, which it cannot be supposed that the Legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes. Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618. These duties are included in the word "consortium"; but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is, whether the presiding justice was right in allowing the jury to consider at all the loss of consortium.

It is argued by the defendant, that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held or even contended for. She has no such right at

common law; but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony. Exceptions overruled.

FENEFF v. NEW YORK CENT. & H. R. R. CO.

Supreme Judicial Court of Massachusetts, 1909. 203 Mass. 278, 89 N. E. 436, 24 L. R. A. [N. S.] 1024, 133 Am. St. Rep. 291.

Tort for the loss of consortium. Writ dated November 22, 1907.

The case came on to be tried before Gaskill, J. It appeared that the plaintiff was the wife of Antione Feneff, who previously had brought an action of his own injuries and had recovered damages in accordance with an opinion of this court reported in 196 Mass. 575. By a stipulation of the parties it was agreed that the evidence introduced by the plaintiff was the same as that in the case of her husband. There was evidence in support of all the material allegations in the plaintiff's declaration.

At the close of the plaintiff's evidence, the judge ruled that the plaintiff could not maintain her action, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

The case was submitted on briefs.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid and assistance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case; for it is plain that the other averments in her declaration do not show an invasion of a legal right, nor anything more than a remote and consequential damage which did not result from any wrong done directly to her.

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. At the common law, the husband had a right to the labor and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover not only for the expenses of her care and cure, but for his loss of her labor and services and the loss of consortium. Kelley v. N. Y., N. H. & H. R. R., 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397, and cases there cited. It is said in that case, and in Nolin

v. Pearson, 191 Mass. 283, 286, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, that a wife could not maintain an action at common law for the loss of consortium of her husband. The reason of this was that she could not sue in her own name for a personal injury, and that a recovery for such a wrong could only be had in a suit brought jointly by her and her husband. The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority. Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, and cases cited. It is now generally held, in accordance with the decision in Nolin v. Pearson, that, for a direct and intentional invasion of a wife's right of consortium by another woman, through the alienation of the husband's affections and criminal conversation with him, an action may be maintained, as a similar action may be maintained by a husband for a similar wrong inflicted through adultery with his wife. Formerly a wife could not maintain such an action, because her suit could only be brought by her husband, with whom she must join. The husband's own misconduct would ordinarily be a sufficient reason to prevent his bringing such an action, if, indeed, it would not bar him, in most cases, from maintaining an action against a joint wrongdoer. The change of the statutes in this Commonwealth and similar changes in most other jurisdictions have given wives the same right as husbands to sue an offender for a wrong of this kind.

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. The actions by husbands at common law for expenses and loss of services, in which the loss of consortium has been considered in estimating damages, were all in cases in which no damages could be awarded for loss of the ability to earn money and render services and be helpful to others, in an action by the husband and wife for the wife's personal damages, because at common law all these elements of damage belonged to the husband. See cases cited in Kelley v. N. Y., N. H. & H. R. R., ubi supra. There was not an allowance to the wife for her loss of ability to earn wages and render services, and at the same time an allowance to the husband, in the form of compensation for the loss of consortium for the same diminution of ability to be helpful.

While there is no intentional wrong, the ordinary rule of damages

goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. It may be conceivable that one may have a contractual right to the labor or services of another, continuing after the time of his injury, such that, if his ability is impaired, the contractor will be directly damaged. If there may be such a case it is unnecessary to consider whether the contractor with such a right should have his action for damages, and receive his proper share of the amount allowable for the impairment of the other's earning powers, and the damages of the other be diminished accordingly. It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is supposed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential.

The case most relied on by the plaintiff, and the only one that comes near to supporting her contention, is Kelley v. N. Y., N. H. & H. R. R., ubi supra. In that case actions of the husband and wife for an injury to the wife were tried together, and the damages in the two suits were assessed at one time by the same jury. It is said in the opinion that "it might be sufficient to dispose of this case to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appeared to have exceeded the amount of the verdict, and that therefore the defendant's exceptions should be overruled." In assessing the damages the jury were permitted to consider the loss of consortium by the husband, and the court held that there was no error. It seems from the verdict that the defendant suffered no injustice in

the amount of damages awarded, and doubtless the court scrutinized less closely the narrow legal question involved than it would have done if it had been called upon to consider whether an action for loss of consortium alone could be maintained in a suit for negligence, when there had been a full recovery by the person injured for all the mental and physical effects of the injury. We are of opinion that in this class of cases there should be no recovery for loss of consortium, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of consortium, to be somewhat benefited by such a payment.

The doctrines stated in the case just cited are not to be applied to cases like the present, and to this extent the decision is overruled.

Exceptions overruled.[16]

GUEVIN v. MANCHESTER ST. RY.

Supreme Court of New Hampshire, 1916. 78 N. H. 289, 99 A. 298, L. R. A. 1917C, 410.

Action by Frank J. Guevin against the Manchester Street Railway. Case transferred from the Superior Court on defendant's exceptions. Exceptions overruled.

Case by a husband for negligence resulting in the loss of his wife's services and society. Trial by jury, and verdict for the plaintiff.[17]

PEASLEE, J. * * * 2. It is also urged that a nonsuit should have been ordered upon the ground that the husband has now no action for the loss of consortium caused by injuries negligently inflicted upon his wife. It was held otherwise in Booth v. Railway, 73 N. H. 529, 63 A. 578; but in view of the facts that one of the authorities then cited by the court (Kelley v. Railroad, 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397) has since been overruled (Feneff v. Railroad, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. [N. S.] 1024, 133 Am. St. Rep. 291; Bolger v. Railway, 205 Mass. 420, 91 N. E. 389; Whitcomb v. Railroad, 215 Mass. 440, 102 N. E. 663), and that the Connecticut court has followed these later cases (Marri v. Railway, 84 Conn. 9, 78 A. 582, 33 L. R. A. [N. S.] 1042, Ann. Cas. 1912B, 1120), the subject has been re-examined.

Two main reasons are stated in these last cases, and in argument here, for the position taken. It is said that the common-law action for

[16] In Bolger v. Boston Elevated R. Co., 205 Mass. 420, 91 N. E. 389 (1910), the Massachusetts court held that the husband could recover nothing for loss of consortium, but only for medical expenses.

[17] The statement of facts and a part of the opinion relating to the facts, are omitted.

injuries to the husband's right called the consortium was based upon loss of service, and that while other elements might be considered in aggravation of damages, they did not constitute a cause of action; that unless loss of service were shown no recovery could be had. No authority is cited to sustain this position. It seems to be conceded that none exists. But the argument is advanced that the state of the law and of society was such that this must have been so, and it is pointed out that no early case upholding such a recovery is to be found. It is apparently true that no positive statement upon the subject, one way or the other, is contained in the early authorities. But much is to be found which is highly significant, and which tends to the conclusion that there was no such limitation upon the right.

The action itself was per quod consortium amisit, not per quod servitum. Loss of service as the only basis of legal right was then recognized and discussed in cases for the seduction of a child or servant, but nowhere is such a statement found as to the right of a husband to recover for injuries to his wife. Undoubtedly the term "consortium" included service, but it also included society, comfort, and the sexual rights. In no early case is there a suggestion that any one of these is superior to any other as a basis for legal redress.

The husband recovered "sur le Prejudice que le Baron ad sustaine, viz.—le perder del' company et comfort que un Feme port a sa Baron." Guy v. Lusy, 2 Rolle, 51. The action was "for the particular loss of the husband, for that he lost the company of his wife, for which he shall have this action, as the master shall have for the loss of his servant's service." Same case sub nom. Guy v. Livesey, Cro. Jac. 501.

At a later date, in a suit for negligently overturning a stagecoach, whereby the plaintiff was injured and his wife was killed, "it appeared that the plaintiff was much attached to his deceased wife; and that, being a publican, she had been of great use to him in conducting his business. But Lord Ellenborough said the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he suffered on her account from the time of the accident till the moment of her dissolution." Baker v. Bolton, 1 Camp. 493.

The same general rule was long ago applied in this state in an action for negligence. "The damages to her husband, from the loss of her services and society, and the expenses of her cure, follow uniformly and by legal necessity from the relation of husband and wife, which entitles him to her services and society, and charges him with her support." Hopkins v. Railroad, 36 N. H. 9, 14, 72 Am. Dec. 287.

These and other cases fully justify the statement in Marri v. Railway, 84 Conn. 9, 13, 78 A. 582, 583 (33 L. R. A. [N. S.] 1042, Ann. Cas. 1912B, 1120), that:

"The law has, however, never been solicitous to distinguish between these different elements of damage or to separate them. The older and more recent text-writers unite in stating that in an action per quod

consortium amisit recovery might properly be had for the husband's loss, whether it partook of the one character or the other." 84 Conn. page 14, 78 A. 583, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120.

The several rights involved all stood alike, and the conclusion seems irresistible that the existence of any of them was sufficient. In cases for the seduction of a daughter the law did take pains to distinguish, for the reason that loss of service was thought to be essential to the maintenance of the action, although the substantial damages might be of another character. No such reason existing here, there would be no occasion to call attention to a distinction which did not exist. Upon the whole matter, it is reasonable to conclude that the theory that there can be no recovery for loss of consortium without proving loss of service is the modern idea.

But if loss of service is essential the cause of action has not been destroyed since some right to services still remains in the husband. As to this it is urged that the husband's right is not now entitled to protection in this class of cases because the right is merely one to receive services voluntarily rendered, that the wife is not now obliged to work for him; and as he cannot demand her services, neither should he be allowed to complain of being deprived of them. But he had no higher right at common law. While the books abound in statements that the wife's services are the husband's and that it is her duty to render them to him, he had no legal remedy if she chose to refuse performance of that duty. His legal right as against her was to such service as she chose to perform for him and to the proceeds of such service as she chose to perform for others. This right was based entirely upon an unenforceable obligation upon her part. His right to enforce obedience by personal chastisement had disappeared long before the adoption of the Married Women's Acts. Even in Blackstone's day it was only the lower classes who still claimed and exercised "their ancient privilege." 1 Blk. Com. 445. For her refusal to perform there was no remedy. Notwithstanding this, the husband has always been entitled to recover from third persons whose wrongful acts rendered her less capable of performance. "He retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce, and he may recover damages for loss of consortium when caused by injuries to her person through the wrongs of others, as well as for criminal conversation." Nolin v. Pearson, 191 Mass. 283, 286, 77 N. E. 890, 891 (4 L. R. A. [N. S.] 643, 114 Am. St. Rep. 605, 6 Ann. Cas. 658).

To dispose of this feature of the situation, it is argued that a new distinction should now be made between the husband's right to recover for intentional and unintentional injuries to his marital rights. It is conceded that some right still exists; but because the original right has been reduced by the Married Women's Acts, it is held that the right to recover for a negligent injury to it has been taken away. And this too in view of the fact that the service which still belongs to the hus-

band is the same service "which the law had in contemplation" when the admittedly sound rule permitting a recovery was announced.

The Married Women's Acts do not deal with the remedies of which the husband may avail himself. So far as his rights still exist he has all the remedy he ever had. If a substantial part of a former right is left the old remedy remains also. The only sound reason for denying the remedy is that the right no longer exists.

The term "consortium," as used at the common law to describe the husband's marital rights, included three elements—service, society, and sexual intercourse. It is conceded everywhere that any injury to or detention of the wife which interfere with the first of these rights gave the husband a cause of action, as did the infringement of the last by the debauchment of the wife. Until within recent years all American courts have assumed and held that injuries to the second element were also entitled to protection. The great weight of authority is still the same way. "From before the days of Blackstone down to the present time, the authorities, English and American, are, without well-considered exceptions, * * * to the effect that the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word 'services' is used, it signifies wifely services, such as are due from her, and includes the idea of her society." Selleck v. Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892.

The Massachusetts court has put the matter even more strongly. "A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word 'consortium'—the right to the conjugal fellowship of the wife, to her company, cooperation and aid in every conjugal relation." Bigaouette v. Paulet, 134 Mass. 123, 124, 45 Am. Rep. 307.

But, in reliance upon dicta of English judges, a Canadian judge denied the right, in 1897. Lellis v. Lambert, 24 Ont. App. 653. Opinion of Osler, J. A. How foreign the whole viewpoint of the opinion is to that obtaining this side of the border is shown by the statement that "the action of the husband against the adulterer is one which has always been regarded as a blot upon English Jurisprudence and social manners." Id. 662. Approaching the question in this attitude of mind, it was natural that the husband's right of action for alienation of affections should be denied. "The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her consortium, never gave a cause of action to her husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her house, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery, and no 'procuring and enticing' or 'harbouring and secreting' of the wife, no action lay at the suit of the husband against the man." Id. 664.

These statements have been treated as though they were the ground of the decision. They were not. They are merely the views of Mr. Justice Osler. The other two judges who delivered opinions expressly put their conclusion upon the ground that the common law gave the wife no such action nor had the Canadian statute done so. They express no concurrence in the views of Justice Osler, although he concurs in theirs.

In Houghton v. Rice, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351, the case is relied upon as holding that there was no action for alienation of affections at common law. That was a suit by the wife, and Lellis v. Lambert is authority for the proposition that she had no such action. But in Houghton v. Rice the court brushed aside all common-law distinction between husband and wife in this respect, and declared that even the husband had no cause of action. As in the opinion of Justice Osler, the later case is barren of authority for the assertion made. Houghton v. Rice and the dicta in Lellis v. Lambert are the only foundation, so far as authority is relied upon, for the underlying theory upon which the late Massachusetts and Connecticut cases are based.

The suggestion that the late American authorities permitting a recovery in this class of cases treat the term "consortium" as excluding the idea of service, involves a misconception of the well-considered cases. What these authorities hold is that there may be an actionable wrong to the right of consortium without loss of service, in the ordinary sense of the term. This certainly has always been the law as to actions for criminal conversation (Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307), and it by no means involves the proposition that service is not included in the general idea of consortium. Because damages may be recovered for impairment of one element of a general right, it does not follow that there are not other elements equally protected by the law. And the abolition or modification of one element by legislative action ought not to be treated as destroying or impairing other elements. Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, 6 Ann. Cas. 658.

It is further urged that as to the incidents of consortium other than service the common law gave a remedy for their destruction, but none for their impairment. On its face the proposition seems at variance with the general policy of the law. If a husband is entitled to his wife's affections and to recover compensation from him who steals them, reason and justice seem to require that he should be entitled to damages from one whose illegal efforts in the same direction are partly successful. Indeed it might be a difficult matter to define what was meant by total alienation. Must the state of the wife's mind be one of active dislike for the husband? Must it be certain the alienation is permanent? Will utter indifference to him be sufficient? Or would a remaining regard like that for mankind in general defeat the action?

In the matter of her society and comfort, other similar questions

arise. And there is one satisfactory and logical answer to them all. The husband is entitled to the whole of his wife's marital affection, and to the whole of such society and comfort as her physical state and mental attitude render her capable of affording him. He who steals any substantial part of that affection, or disables her physically or mentally from rendering such aid and comfort, is guilty of an infringement of the husband's rights, and should be required to make compensation. No case holding the contrary has been found, save those which have been decided within 20 years.

The statement in Marri v. Railway, that the acts complained of "must be necessarily destructive of" the rights involved is contradicted by other cases in the same state. Precisely the reverse of this proposition was decided to be the law in an earlier Connecticut case. The question was directly involved, and the case is apparently approved in the one above cited. The suit was for alienation of a husband's affections, accompanied by adultery. It was urged as a defense that the plaintiff and her husband continued to live together as husband and wife. "Whatever may have been the measure or quality of the remnant of conjugal affection and society permitted to the plaintiff by the defendant, as a matter of fact, and of law as well, the plaintiff has been deprived of the conjugal affection and society which the marriage contract entitled her to enjoy and required her husband to give; * * * a valuable right, absolutely sole in her and incapable of division, has been injured." Foot v. Card, 58 Conn. 1, 18 A. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258.

The short answer to the contention now under consideration is well stated by Rowell, J., in Fratrini v. Caslini, 66 Vt. 273, 29 A. 252, 44 Am. St. Rep. 843:

"As to the claim that there is no such thing as a partial alienation of affections, it is enough to say that experience and observation show the fact to be far otherwise."

The other argument chiefly relied upon is that if this action is sustained the defendant will be subjected to the payment of double damages. Since she can sue and be sued "as if she were unmarried" (P. S. c. 176, § 2), it is argued that her damages will be measured without regard to her marital status. This involves a misconception of the true measure of her damages. She is to recover for injury to the rights given to her "as if she were unmarried"; but this does not mean that she has been divested of all marital duties and obligations, either legally or morally. The statute does not profess to create new rights, but to give to the wife the rights which her husband theretofore could claim through her or to give vitality to rights theretofore dormant because of her inability to sue. It does not undertake to transfer from husband to wife rights which were theretofore his in the strict sense; that is, rights for the violation of which he must sue at common law without joining her as plaintiff. Her services for others were of the class in which she might be joined as plaintiff. Weller v. Baker, 2

Wils. 414, 424. But her services for him were not. "If the battery, imprisonment, or malicious prosecution of the wife deprive the husband for any time of her company or assistance, or occasion him expense, he may and ought to sue separately for such consequential injuries." I Chit. Pl. 83. These latter rights remain in the husband. He is still liable for her support, and has the right to expect that she will render for him those services which practically every wife does render in a greater or less degree. So far as the evidence shows a probability that those services would have been performed but for the injury, the loss is the husband's. Filer v. Railroad, 49 N. Y. 47, 10 Am. Rep. 327.

Her recovery is limited because of the fact that the loss of that part of her capacity to earn money is not a damage to her. As to that, she has lost nothing which was of value to her. "If she is interfered with in her business transactions, and for that reason unable to earn what she otherwise would have earned, the damage is personal to her." Normile v. Company, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901. But if she voluntarily performed services for her husband, the impairment of capacity "was his loss, and not that of his wife." Standen v. Railroad, 214 Pa. 189, 200, 63 A. 467, 6 Ann. Cas. 408.

"The wife has the same right to give to her husband her services either in the household or in his business as she had before the passage of the statute, and the same obligation rests upon her to discharge her duty to her husband. * * * There might be circumstances existing which would entitle the wife, in an action for damages, to recover for the value of her own services. * * * In other words, the husband is entitled to recover for the damage sustained on account of the loss of the services of the wife, and the value of her services, and loss sustained by reason of her inability to perform them, must necessarily depend on the character and value of the services which she is capable to perform, and is accustomed to perform for the husband." Citizens' St. Ry. Co. v. Twiname, 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352.

The rule as to her damages is not peculiar to the relation of husband and wife. It may apply to any person so circumstanced that there is no probability he or she would ever desire to use for profit the power lost or impaired. It may apply in the case of a man as well as in that of a woman. Suppose a father who is without means lives with his son, who provides the father with every luxury, and will probably continue to do so. The father's injury renders him incapable of hard manual labor. But for it, he could have worked as a ditcher and earned $2 a day. He is not entitled to substantial damages on this account, for the simple reason that this loss is to him no substantial injury. So it would be with a daughter who lived with wealthy parents and neither performed nor was likely to perform manual labor, because of her family relations. And so it must be with the wife who lives with her husband, cares for his household, and will continue to do so as long as the relation exists. True it is that she might abandon her family duties

and earn money, as in the supposed cases the father or the daughter might. But the evidence not warranting a finding that they would have done so but for the accident, there is no proof of loss resulting to any one of them on this account.

The rule under the statute creating liability for wrongfully causing death (Carney v. Railway, 72 N. H. 364, 57 A. 218; Imbriani v. Anderson, 76 N. H. 491, 84 A. 974) has no application to this class of cases. That statute in terms makes earning capacity the test, and in that respect differs from the common law. See Dillon v. Railway, 73 N. H. 367, 368, 62 A. 93.

The argument from the assumption that the wife will recover for all loss of capacity to earn money has no force here because the true rule is that she does not so recover. The aggregate amount of the verdicts recovered by the husband and wife on account of loss of her capacity for service is only equal to the total loss of capacity. What she recovers for he does not, and vice versa. Standen v. Railroad, 214 Pa. 189, 63 A. 467, 6 Ann. Cas. 408.

It is said also that to permit the husband to recover in this class of cases "carries legal refinement too far into the region of the impractical, in an attempt to save a principle which does not belong to conditions which now exist." That "the law has never undertaken any such investigations has never countenanced any attempt to measure pecuniarily such a loss." Marri v. Railway, supra, 84 Conn. 23, 78 A. 587 (33 L. R. A. [N. S.] 1042, Ann. Cas. 1912B, 1120). If this were true, it would follow that there could no longer be a recovery for loss of society in suits for enticement and the like. If the law never undertakes such investigation nor countenances any attempt to measure the value of this right, of course compensation can never be awarded for its loss or impairment. The case of Foot v. Card, 58 Conn. 1, 18 A. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258, shows that the law is otherwise in Connecticut, and the Massachusetts authorities are the same way.

Another suggestion is that as the wife's disposition towards her husband has not been changed he ought not to be heard to complain that she has been rendered incapable of doing for him the household duties she would willingly perform if she could. The mere statement of the argument discloses its unsound logic; and it seems especially ill adapted to fortify the argument that recovery must be refused because the elements of damage claimed are too refined for legal mensuration. The wife's affections are certainly more difficult to translate into terms of money value than are her household services, and the argument that the more easily valued element cannot be valued because the more difficult to value is not involved in the computation carries no weight.

That the damage to this plaintiff could not have been foreseen by the defendant is not a defense. The test in cases for negligence is to inquire whether the resulting damage was "a direct consequence of the defendants' tortious act, without regard to whether the particular dam-

age could or could not have been foreseen by them." Whittemore v. Railroad, 77 N. H. 61, 63, 86 A. 824, 825.

Finally it is said that if in view of modern statutes the husband can still recover for injuries negligently inflicted upon the wife it must follow that she can in like manner recover for injuries to him. The question is not here involved except incidentally and as a test for the soundness of the conclusions reached. But it may be remarked that notwithstanding the changes which have been made the husband is still the head of the family, and in many ways represents its interests. For example, it is not likely to be claimed that the wife now has the same right as the husband to sue for the seduction of their daughter. Again, the duty to support the wife rests upon him, and she has in this way a substantial, though indirect, interest in what he recovers.

The general question has been examined and considered independently of the authorities in this jurisdiction. Historically, upon the authorities at large and upon principle, it seems to be well settled that the husband's action for negligent injury to the consortium was not dependent upon his proving loss of service, that any substantial injury to marital rights is actionable, that the husband still has a limited but yet substantial right to the wife's services, and that the application of the true rule of damages does not permit any double recovery. The decision in Booth v. Railway, 73 N. H. 529, 63 A. 578, is reaffirmed.

3. The record of the trial of the wife's suit for damages caused to her by the same accident was offered to show that certain expenses of her illness were then claimed by her. The record was ruled in to the extent of the items specified, but beyond that it was excluded. The defendant now argues that if the record showed that the husband was a witness in that suit and testified as to the wife's loss of earning capacity it would bar him from a recovery for the same items here. It is not necessary to consider the soundness of this argument, for the evidence was not offered for that purpose. It was not suggested at the trial that the record would disclose any such state of affairs.

Exceptions overruled. All concurred.[18]

[18] The great weight of authority is in accord. But, under statutes giving married women their earnings, a husband, in order to recover for the loss of his wife's services, must plead and prove that he was receiving the services when the wife was injured. Atchison, T. & S. F. R. Co. v. Dickey, 1 Kan. App. 770, 41 P. 1070 (1895).

In Hipp v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873 (1921), it was held that a wife could recover for a negligent injury to her husband. She included in her claim damages for expenses incurred, labor, loss of support, consortium, and mental anguish. The court relied upon the dissenting opinion of Bond, C. J., in Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320 (1919). This position of the North Carolina court was practically abandoned, however, in the cases of Hinnant v. Tide Water Power Co., 189 N. C. 120, 126 S. E. 307, 37 A. L. R. 889 (1925), and Craig v. Suncrest Lumber Co., 189 N. C. 137, 126 S. E. 312 (1925). The note in 5 A. L. R. 1049, collects the cases on "malicious injuries" to her husband, for which a wife is allowed to recover. See, also, Bradstreet v. Wallace, 254 Mass. 509, 150 N. E. 405 (1926); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A.

SNEDAKER v. KING.

Supreme Court of Ohio, 1924. 111 Ohio St. 225, 145 N. E. 15.

Error to Court of Appeals, Adams County.

Grace King filed suit in the court of common pleas of Adams county against Jessie L. Snedaker, and in her amended petition alleged that she is the wife of Homer King, they having been married May 14, 1908, to which marriage four children were born, all now being under 16 years of age, who reside with the plaintiff; that about five years prior to the filing of the amended petition the defendant, purposely and maliciously, intending to win from the plaintiff the affection, companionship, conjugal relation, support, and love of her husband, and to appropriate the same to herself, wickedly, secretly, stealthily, and maliciously caused him to dislike plaintiff by making to him false statements regarding plaintiff, and by showing him numerous marks of affection, and by writing, speaking, and communicating with him and visiting him at his home and other places, and by other acts of conduct toward and with him, by which means the defendant unlawfully, purposely, and maliciously caused plaintiff's husband to begin to lose his love and affection for plaintiff, and to form an attachment and affection for the defendant. * * *

Error was prosecuted to the Court of Appeals, and the finding of the court of common pleas was affirmed. To reverse this judgment of the Court of Appeals, error is now prosecuted to this court.[19]

PER CURIAM. The decree in this case is an extreme instance of government by injunction. It attempts to govern, control, and direct personal relations and domestic affairs. Among other restrictions placed upon the defendant by this decree is that of remaining away from any place where plaintiff's husband may be, and from interfering with plaintiff's efforts to communicate with her husband, and with her efforts to regain his love, esteem, support, and conjugal relation. It would be only a little more extreme if the husband had been made a party defendant, and a mandatory injunction decreed requiring him to discharge all the duties of companionship, affection, love, and all other obligations, legal and moral, assumed by him when he entered the conjugal relation.

Ample and adequate provision has been made by statute whereby the plaintiff's husband may be required to discharge every obligation imposed upon him by law, not only toward the plaintiff, but also in behalf of their children. There is no averment that the husband has failed in

(N. S.) 360, Ann. Cas. 1913A, 983 (1912), the latter being a case of the sale of habit forming drugs by the defendant to the husband, after the wife had protested. See, also, Anderson v. McGill Club, —— Nev. ——, 266 P. 913 (1928), where the wife sued the defendant for maintaining a poker game in which the husband spent his time and money.

19 A considerable part of the statement, and the dissenting opinions of Marshall, C. J., and Day, J., are omitted.

any of these particulars. In that respect the injunction is based upon the apprehension of the plaintiff that she may in the future be deprived of support, by reason of the alleged alluring conduct of the defendant toward plaintiff's husband.

Such extension of the jurisdiction of equity to regulate and control domestic relations, in addition to the legal and statutory remedies already provided, in our opinion is not supported by authority, warranted by sound reason, or in the interest of good morals or public policy. The opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby, warrant the denial of such a decree in this case, and require a modification of the judgment in that respect.

Judgment modified and affirmed.

ROBINSON, JONES, MATTHIAS, and ALLEN, JJ., concur.

CONN, J., not participating.

ALLEN, J. (concurring). No one who views the marriage contract from an ethical standpoint can have the slightest sympathy for the plaintiff in error upon the record disclosed herein; however, I concur in the per curiam opinion of the majority of the court for the following reasons:

First: While it is true that any injunction is enforceable only through contempt proceedings, it is also true that this particular order is unusually difficult of enforcement. The ordinary injunction involves a prohibition against selling property or against doing some act which will involve indifferent third parties; that means that proof of the violation of the order may usually be readily secured. In this case the injunction affects two people only. Under the facts as found, these two people stand in a wrongful relationship to each other. Proof of the violation of this particular order will depend, at least largely, upon the testimony, not of indifferent third parties but of these particular two people. Under these circumstances it is difficult to see how the court can enforce the injunction granted herein without attaching a probation officer permanently to both Miss Snedaker and King.

Second: The order passes all bounds in its lack of limitation. Under this order, what is Miss Snedaker to do if she passes King upon the street? Must she cross the street in order not to go "near him * * * at * * * any * * * place where said Homer King may be," or may she stay upon the same side of the street and pass him? Under such circumstances may she say "good morning" to him, or in so doing will she be violating the order that she is not to communicate with King "by word"?

Third: This injunction should not issue, because an order that forbids a man and woman to see each other or to speak to each other under the facts herein set forth, merely adds fuel to the flame. If the wife is to be assisted in her fight for a rehabilitated home, action should

not be taken which will almost inevitably make wrong-doing even more alluring to her husband.

It has been urged that to dissolve this injunction is to condone the action of the plaintiff in error. Equity, however, refuses to enjoin many acts which it does not condone. Equity will not enjoin the commission of crime. This is not because it condones the commission of crime, but because it takes no part in the administration of the criminal law. Neither does this court condone the acts set forth in the petition and found by the trial judge.

It is significant to note that the judgment against Miss Snedaker has not been reversed; the injunction only has been dissolved. Upon the facts as found by the trial court Miss Snedaker's action is still branded in this court. That condemnation is her most adequate punishment. To add thereto a judgment, which, from the perversity of human nature, would tend to defeat rather than to accelerate the reconciliation of the husband and wife, seems unwise.[20]

[20] "But the appellant urges that, while there may be authority for the maintaining of a suit for damages by the wife alone, yet in the instant case the plaintiff did not ask for damages, but asked only for a writ of injunction. We can see no distinction as to the wife's capacity to bring a suit alone against a defendant for alienating the affections of her spouse, and the deprivation of the wife's right to the care and comfort and enjoyment of her husband's society, and asking for damages by reason of the wrongful acts of the defendant, and a case where she waives all question of a pecuniary return to her of the value of those precious things of which she has been deprived, and merely asks that the wrongdoer be restrained from continuing and repeating the acts and conduct by means of which plaintiff has been injured. Such a doctrine would be tantamount to holding that one who had a home, with carefully tilled crops on it, ready for harvest, would have the right to sue in damages an enemy who was seeking to destroy a dam or dyke, and thereby let the floods inundate such farm and crops and utterly destroy them, but would not have the capacity or right to prevent such acts by an injunction. We do not believe that any such distinction exists in law or in equity, and that a wife has just as much capacity to bring an injunction suit against one seeking to destroy the sanctity of her home and alienate the affections of her husband as she has to bring a suit for damages after the alienation has been completed and the fell wrong done." Buck, J., in Smith v. Womach (Tex. Civ. App.) 271 S. W. 209, 212 (1925).

See notes in 38 Harv. L. Rev. 396, 19 Ill. L. Rev. 587, 25 Col. L. Rev. 373, and 34 Yale L. J. 327.

CHAPTER 3

CRIMINAL AND CIVIL RESPONSIBILITY OF THE SPOUSES TO EACH OTHER

FULGHAM v. STATE.

Supreme Court of Alabama, 1871. 46 Ala. 143.

Appeal from Circuit Court of Greene.

Tried before Hon. Charles Pelham.

This was an indictment of the husband for an assault and battery upon his wife. The indictment charges that before the finding thereof, "George Fulgham assaulted and beat his wife, Matilda Fulgham, against the peace," etc. Appellant went to trial on plea of not guilty, and was convicted and fined.

From the bill of exceptions, it appears that the accused was chastising one of his children, when the wife remonstrated, thinking the punishment excessive. The child ran, pursued by the father, and both followed up by the wife. When the wife came up with her husband, he struck her twice on the back with a board, and she returned the blows with a switch. The blows inflicted on the wife made no permanent impression. Both were high tempered, and were emancipated slaves, and were husband and wife.

This being all the evidence, the court charged the jury that "if they believed that defendant struck his wife with a board, as described in the evidence, in anger, and not in self-defense, he was guilty of an assault and battery; that words of provocation and abuse by the wife, if she used any at the time of the fight, would, under the statute of Alabama, be in justification or extenuation, as they might see fit." The defendant excepted to this charge, and requested the court to charge the jury that "a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness." This charge the court refused to give, and "further charged that the proposition that a husband could moderately chastise his wife, was a relic of barbarism, and no part of the law of Alabama, although it might be of North Carolina or Mississippi. To the refusal to give the charge asked, and to the remark above, defendant excepted."

The charges given, and the refusal to give the charge asked, are now assigned as error.

PETERS, J. This is a criminal prosecution by indictment upon a charge of assault and battery by the husband upon the person of the wife. The defense relied on by the accused is, that a husband may

give his wife moderate correction in order to secure her obedience to his just commands.

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone, or as he says, "in the polite reign of Charles the Second," except among "the lower rank of the people, who were always fond of the old common law," by which "they claim and exert their ancient privilege" to give their wives "moderate correction," to secure subordination in the family. 4 Bl. Com. 444, 445, marg. page. It will be seen from this reference, that this eminent and classic commentator on the law of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people—of those of the higher as well as those of the lower rank. The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws can not be enforced in this State. The law for one rank is the law for all ranks of the people, without regard to station. Judge Blackstone calls it merely an ancient privilege, and quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law. This distinguished author published his Commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here. If it was, the offense of witchcraft and sorcery, which were crimes at common law, and most cruelly punished against the voice of both reason and religion, might be indicted here. 4 Bl. Com. p. 60. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. Turner v. Turner, 44 Ala. 437; Goodrich v. Goodrich, 44 Ala. 670; Moyler v. Moyler, 11 Ala. 620; Saunders v. Saunders, 1 Rob. Ec. R. 549. The husband may defend himself, his children, and those relations whom the law permits him to defend, against the violence of the wife. 12 Ala. 587; 1 Bish. Cr. Law, 341. But in person, the wife is entitled

to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of the laws. Her sex does not degrade her below the rank of the highest in the commonwealth.

Speaking of the duty of the husband to the wife, a late expounder of the law of this great relation declares that he "is bound to love his wife and to bear with her faults, and if possible, by mild means to correct them." Schouler, Dom. Rel. 59; 1 Bouv. Law Dict. 675, Husband; Goodrich v. Goodrich, 44 Ala. 670. This is the voice of the law, and the voice of politeness and humanity, and I think also the voice of religion, which is, after all, but pure and disinterested love. St. Paul's Epists. ad Corinths., ubique.

Besides this, the constitution has wisely and justly extended the protective power of the State to all its people alike. Its shield is stretched out over the high and the low, and the rich and the poor, the strong and the weak, the wise and the simple, the learned and the unlearned, and the good and the bad, without distinction of rank, caste or sex. All stand upon the same footing before the law, "as citizens of Alabama, possessing equal civil and political rights and public privileges." And no special "privilege" to any rank of the people is allowed to exist in this State, because such a privilege is forbidden by the fundamental law. Const. Ala. 1867, art. 1, §§ 2, 32; Dale v. Governor, 3 Stew. 387. I therefore think that the common law of "wife-whipping" among "the lower rank of people" in Great Britain has never been the common law of this State. It is, at best, but a low and barbarous custom, and never was a law.

The husband may exercise over the wife "gentle restraint." 2 Kent, 181. And he may have security of the peace against the wife, and the wife against him. 4 Bla. Com. 445. And they may be indicted for assault and battery upon each other. Bradley v. The State, Walker R. 156. But beyond this, "the rule of love has superseded the rule of force." Schoul. Dom. Rel. 59.

There was, then, no error in the charge given, or in refusing the charge asked. Therefore, let the judgment of the court below be in all things affirmed.[1]

PECK, C. J., dissenting.

SMITH, C. J., in STATE v. EDENS.[2] Supreme Court of North Carolina, 1886. 95 N. C. 693, 59 Am. Rep. 294: "Can an indictment be sustained against the husband for charging the wife with incontinency? At common law verbal slander was not the subject of a criminal prosecution, and is now a misdemeanor only in the case of the imputation of

1 Accord: State v. Finley, 4 Pennewill (Del.) 29, 55 A. 1010 (1902); Lawson v. State, 115 Ga. 578, 41 S. E. 993 (1902). Contra: State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78 (1868), where the husband without provocation hit his wife three licks with a switch the size of his finger.

2 The court held that a verdict for the defendant husband, under indictment for slandering his wife, should have been directed.

a want of virtue in an innocent woman made in a wanton and malicious attempt to destroy her reputation. Does the enactment embrace those sustaining marital relation, or is its operation confined to those not thus related? * * * It may be suggested that an indictment might lie, while an action for damages would not, as in case of the assault and battery of the wife by the husband. But it is not correct to say that such an indictment may in all cases be maintained. It is only where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted, or where it is prompted by a malicious and wrongful spirit, and not within reasonable bounds, that the law interposes to punish. In other cases, short of these extremes, it drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution. It presumes that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory. So, too, the harsh and cruel word that sends a pang to the sensitive heart may be recalled, and relations that should never have been interrupted by an unkind or unwarranted expression, again restored. The unnumbered mischiefs that might flow from making an unguarded and false imputation upon the wife's chastity the subject of a public criminal proceeding, are so obvious that he cannot think the General Assembly intended such a possible result. Not only might this destroy the freedom and cordiality of marital intercourse, but it would tend to make a perpetual estrangement and severance, and cut off the reconciliation that may be expected to succeed a temporary difference and the atonement of a full repentance. Our law regards the marriage relation sacred and permanent, life-long in its duration, and it leaves temporary differences and wrongs which one may do to the other to the corrective hands of time and reflection, in cases where they admit this remedy. We are not disposed, in carrying out the policy of separate properties, to break in needlessly upon that oneness of husband and wife, which is the fundamental and cherished maxim of the common law, by extending the act beyond all the beneficent purposes it was intended to subserve, to cover cases of slander."

PETERS v. PETERS.

Supreme Court of Iowa, 1875. 42 Iowa, 182.

[The plaintiff alleges that she is the wife of the defendant and claims damages of the defendant for eleven distinct assaults and batteries at various times while she and the defendant were husband and wife. The defendant demurred. The demurrer was sustained and the plaintiff appeals.]

DAY, J. If this action can be maintained, it is because of the provisions of our statute.

Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture.

The sections of the Code mainly relied upon by appellant for the accomplishment of the results which, it is claimed, have been effected, are 2204 and 2211.

Section 2211 is as follows: "A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried."

The following is section 2204: "Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried."

It is evident that section 2211 refers to and authorizes actions against parties other than the husband; for if this section allows an action generally against the husband, it covers and embraces more than is included in section 2204, and that section is rendered useless and meaningless. Whatever right of action exists against the husband must, therefore, be found in section 2204. This section is limited to actions for property or rights growing out of the same. But in this connection appellant cites Musselman v. Galligher, 32 Iowa, 383, which approves Chicago, Burlington & Quincy R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606, holding that a right to sue for an injury is property, and that where this right of action exists in favor of the wife, it is her property, for which she may sue. It is claimed that, from this decision and the section above quoted, the right to maintain this action necessarily follows. But it is quite evident that this course of reasoning assumes the very thing to be established. Section 2204 authorizes the wife to maintain an action against her husband for the recovery of her property; and Musselman v. Galligher recognizes the doctrine that when a right to sue for an injury exists, that right is property. Before any conclusion favorable to the appellant can be drawn from these premises, the right of the wife to maintain an action against the husband for a tort must be either admitted or assumed. In other words, the argument involves the admission or assumption of the thing undertaken to be proved. The argument, fully expressed, is as follows: The wife may sue the husband for her property; when a right exists to sue for a tort, that right is property; the right of the wife to sue the husband for a tort exists; therefore the wife may maintain an action against the husband for a tort; or, the wife may sue the

husband for a tort, because the wife has a right to sue the husband for a tort.

We are satisfied that the statute contains no provisions which authorize this action, and that the demurrer was properly sustained.

Affirmed.

THOMPSON v. THOMPSON.

Supreme Court of the United States, 1910. 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing an action brought by a wife against her husband, to recover damages for an assault and battery. Affirmed.

Mr. Justice DAY delivered the opinion of the court:

This case presents a single question, which is involved in the construction of the statutes governing the District of Columbia. That question is, Under that statute may a wife bring an action to recover damages for an assault and battery upon her person by the husband?

The declaration of the plaintiff is in the ordinary form, and in seven counts charges divers assaults upon her person by her husband, the defendant, for which the wife seeks to recover damages in the sum of $70,000. An issue of law being made by demurrer to the defendant's pleas, the supreme court of the District of Columbia held that such action would not lie under the statute. Upon writ of error to the court of appeals of the District of Columbia, the judgment of the supreme court was affirmed. 31 App. D. C. 557, 14 Ann. Cas. 879.

At the common law the husband and wife were regarded as one, the legal existence of the wife during coverture being merged in that of the husband; and, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the states looking to the relief of a married woman from the disabilities imposed upon her as a feme covert by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the security of her person against the wrongs and assaults of others.

It is unnecessary to review these statutes in detail. Their obvious purpose is, in some respects, to treat the wife as a feme sole, and to a

large extent to alter the common-law theory of the unity of husband and wife. These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms, and are to be construed with a view to effectuate the legislative purpose which led to their enactment.

It is insisted that the Code of the District of Columbia has gone so far in the direction of modifying the common-law relation of husband and wife as to give to her an action against him for torts committed by him upon her person or property. The answer to this contention depends upon a construction of section 1155 of the District of Columbia Code. 31 Stat. at L. 1374, c. 854. That section provides:

"Sec. 1155. Power of wife to trade and to sue and be sued.—Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract, committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser."

In construing a statute the courts are to have in mind the old law and the change intended to be effected by the passage of the new. Reading this section, it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention or control of the husband, and to maintain actions separately for the recovery, security, and protection of her property. At the common law, with certain exceptions, not necessary to notice in this connection, the wife could not maintain an action at law except she be joined by her husband. Barber v. Barber, 21 How. 582, 589, 16 L. Ed. 226, 228. For injuries suffered by the wife in her person or property, such as would give rise to a cause of action in favor of a feme sole, a suit could be instituted only in the joint name of herself and husband. 1 Cooley, Torts (3d Ed.) 472, and cases cited in the note.

By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in § 1155 and other sections of the Code, she is given the right to sue *separately* for redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to the very question

under consideration, is apparent from the consideration of its terms. Married women are authorized to sue separately for "the recovery, security, or protection of their property, and for torts committed against them as fully and freely as if they were unmarried." That is, the limitation upon her right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband.

This construction we think is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes.

It is suggested that the liberal construction insisted for in behalf of the plaintiff in error in this case might well be given, in view of the legislative intent to provide remedies for grievous wrongs to the wife; and an instance is suggested in the wrong to a wife rendered unable to follow the avocation of a seamstress by a cruel assault which might destroy the use of hand or arm; and the justice is suggested of giving a remedy to an artist who might be maimed and suffer great pecuniary damages as the result of injuries inflicted by a brutal husband.

Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would, at the same time, open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel, and alleged injuries to property of the one or the other, by husband against wife, or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the government. In cases like the present, interpretation of the law is the only function of the courts.

An examination of this class of legislation will show that it has gone much further in the direction of giving rights to the wife in the management and control of her separate property than it has in giving rights of action directly against the husband. In no act called to our attention has the right of the wife been carried to the extent of opening the courts to complaints of the character of the one here involved.

It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it

to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.

We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration.

Some of the cases of that character are: Bandfield v. Bandfield, 117 Mich. 80, 40 L. R. A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Schultz v. Schultz, 89 N. Y. 644; Freethy v. Freethy, 42 Barb. 641; Peters v. Peters, 42 Iowa, 182.

Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court, in protecting her rights and awarding relief in such cases, may consider, and, so far as possible, redress her wrongs and protect her rights.

She may resort to the chancery court for the protection of her separate property rights. 21 How. 582, 590. Whether the wife alone may now bring actions against the husband to protect her separate property, such as are cognizable in a suit in equity when brought through the medium of a next friend (21 How. supra), is a question not made or decided in this case.

We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. We think the construction we have given the statute is in harmony with its language, and is the only one consistent with its purpose.

The judgment of the Court of Appeals of the District of Columbia will be affirmed.

Mr. Justice HARLAN, dissenting:

This is an action by a wife against her husband to recover damages for assault and battery. The declaration contains seven counts. The first, second, and third charge assault by the husband upon the wife on three several days. The remaining counts charge assaults by him upon her on different days named; she being at the time pregnant, as the husband then well knew.

The defendant filed two pleas—the first, that he was not guilty; the second, that, at the time of the causes of action mentioned, the plaintiff and defendant were husband and wife, and living together as such.

The plaintiff demurred to the second plea, and the demurrer was overruled. She stood by the demurrer, and the action was dismissed.

The action is based upon sections 1151 and 1155 of the Code of the District (31 Stat. at L. 1373, 1374, c. 854), which are as follows:

"Sec. 1151. All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor, or personal exertions, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be *her own property as absolutely as if she were unmarried,* and shall be protected from the debts of the husband, and shall not in any way be liable for the payment thereof: Provided, That no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors." [The learned Justice here quoted section 1155, already quoted in the opinion of Mr. Justice Day.]

The court below held that these provisions did not authorize an action for *tort* committed by the husband against the wife.

In my opinion these statutory provisions, properly construed, embrace such a case as the present one. If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department. With the mere policy, expediency, or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be, leaving the responsibility for legislation where it exclusively belongs; that is, with the legislative department, so long as it keeps within constitutional limits. Now, there is not here, as I think, any room whatever for mere construction, so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of her skill, labor, or personal exertions, "as absolutely *as if she were unmarried.*" It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that it did not authorize this suit. But the statute goes much farther. It proceeds to authorize married women "also" to sue separately for the recovery, security, or protection of their property; still more, they may sue separately "for *torts* committed against *them,* as fully and freely *as if they were unmarried.*" No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the

party charged with transgressing the rights conferred upon the wife by the statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it had previously existed. It makes a radical change in the relations of man and wife as those relations were at common law in this District. In respect of business and property, the married woman is given absolute control; in respect of the recovery, security, and protection of her property, she may sue separately in *tort,* as if she were unmarried; and in respect of herself, that is, of her person, she may sue separately as fully and freely as if she were unmarried, "for *torts* committed *against her.*" So the statute expressly reads. But my brethren think that, notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and therefore they are moved to add, by construction, to the provision that married women may "sue separately * * * for torts committed against them, as fully and freely as if they were unmarried," these words: "Provided, however, that the wife shall *not* be entitled, in any case, to sue her husband separately for a tort committed *against her person.*" If the husband violently takes possession of his wife's property and withholds it from her, she may, *under the statute,* sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property, she may, *under the statute,* sue him, separately, for damages. That action would also be one in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security, and protection" of her property? But if they are conceded—as I think they must be—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person.

I repeat that with the policy, wisdom, or justice of the legislation in question this court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority.

My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the

Legislature by a construction of its words that cannot be reconciled with their ordinary meaning.

I dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice HOLMES and Mr. Justice HUGHES concur in this dissent.[3]

BROWN v. BROWN.

Supreme Court of Errors of Connecticut, 1914. 88 Conn. 42, 89 A. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70.

Action by Elizabeth C. Brown against Thomas S. Brown. From a judgment for defendant, plaintiff appeals. Reversed and remanded for further proceedings.

THAYER, J. The plaintiff by this action seeks to recover damages from her husband for an assault and battery and false imprisonment. The parties were married in October, 1877. If she has a cause of action against her husband, it is not questioned that the suit is well brought. The complaint is demurred to; the only ground of demurrer assigned being that, by reason of her coverture, she has no cause of action against him for the personal injuries alleged in the complaint. The superior court sustained the demurrer, and the only question presented by this appeal is whether that ruling was correct.

By the common law the husband might restrain the wife of her liberty and might chastise her. 1 Blackstone, Com. 444. "The law which attached such subjection to the legal status of a married woman has been abolished, but not by direct legislation; it has disappeared under the continuous pressure of judicial interpretation or indirect legislation." Mathewson v. Mathewson, 79 Conn. 23, 27, 63 A. 285, 287 (5 L. R. A. [N. S.] 611, 6 Ann. Cas. 1027). It is now as unlawful for him to beat or falsely imprison his wife as for another to do so, and he is amenable to the criminal law for such an offense. If another, prior to the recent statutes, committed these offenses against her, they were liable in an action for the injuries inflicted upon her by such torts, but the action had to be brought in the name of her husband and herself jointly; the real purpose of the action being to reduce the chose into the possession of the husband. The wife was joined, because, if her husband should die pending the suit, the damages would survive to her. 1 Blackstone, Com. 443; 1 Chitty on Pleading, 73. The common law regarded husband and wife as but one person, and the husband was that person. Being but one person, they could not contract with or sue one another. This resulted logically from the legal identity of husband and wife. If this were the present status of the parties, the plaintiff could have no action for the recovery of damages for the torts alleged.

[3] See note 5, p. 433, infra.

Public Acts 1877, c. 114, entitled an act in alteration of the act concerning domestic relations, but commonly called the Married Woman's Act, established a new legal status for persons thereafter married. It took effect April 20, 1877, and is embodied in the present revision of the general statutes. The purpose and effect of the act were in question in Mathewson v. Mathewson, supra. In the opinion, written by Judge Hammersley, after a review of the previously existing law relating to the status of married persons, it is held that "in enacting this law the state adopted a fundamental change of public policy"; that by it "the unity in the husband of his own and his wife's legal identity and capacity to own property was removed, and a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property, was laid"; and that since the act took effect "husband and wife alike retain the capacity of owning, acquiring, and disposing of property, which belongs to unmarried persons." In that action a wife had sued her husband for breach of contract. The act provides that the wife shall have power to make contracts with third persons, and it was claimed that, as it in terms gave husband and wife no power to contract with each other, such power is prohibited; but it was held that, as the act "is in the nature of fundamental legislation, it involves all the results necessarily flowing from the principle established;" that the consequences resulting from the new status established by the act were not to be prohibited by inference, unless such inference is necessary; and that the right of husband and wife to sue each other for breach of contract is one of the consequences of the new status established by the act.

In Marri v. Stamford Street R. R. Co., 84 Conn. 9, 23, 24, 78 A. 582, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120, we held that, as the result of the legal status created by the act of 1877, the wife may now, by an action in her own name, recover for physical injuries tortiously inflicted upon her as fully and to the same extent as a husband may when he is the person injured, and that the wife's right of recovery for her injuries is exclusive. In that case a husband had been allowed to recover, among other things, for the loss of his wife's services caused by her injuries, and so much of the judgment as allowed him damages for the loss from such injuries was set aside.

By these two cases it is established that a wife, married since April 20, 1877, may contract with her husband or other person and may in her own name sue her husband or such other person for breach of such contract; also that she has a cause of action upon which she may recover in a suit brought in her own name for personal injuries wrongfully inflicted upon her by others than her husband. If a cause of action in her favor arises from the wrongful infliction of such injuries upon her by another, why does not the wrongful infliction of such injuries by her husband now give her a cause of action against him? If she may sue him for a broken promise, why may she not sue him for a broken arm? The defendant's answer is that a wise public policy for-

bids it; that no right of action accrued to her from such a tort prior to the statute of 1877; that none is expressly given her by that statute, and that none can be implied; and that this is the holding of courts in other jurisdictions in cases which have arisen under similar statutes.

It is true that courts in some of the states have held that statutes more or less similar to the one here in question give a married woman no right of action against her husband for a tort. They find in the statutes construed no legislative intent to change the legal status of husband and wife as regards the legal identity of the two, but simply an intent to ameliorate the condition of the wife by permitting her to retain and deal with her own property and to contract with and sue and be sued by others than her husband. These courts generally hold that, unless there is an express provision giving her the right to sue her husband, she has no action against him upon contract or for tort. It is unnecessary to review the individual cases. As we said in Mathewson v. Mathewson, supra, where an act which leaves the foundation of the marriage status unchanged, and merely provides exceptions to the necessary consequences of that status, such exceptions may properly be limited by the necessary import of the language describing them. If the legislative intent in such an enactment is not to change the foundation, upon which the status of married persons was based at common law, namely, their legal identity, but its purpose is to empower the wife, while that status exists, to contract and sue in her own name like a feme sole, it might well be held that language bestowing this right could not be so extended as to permit her to contract with her husband or to sue him for a tort, because the statute intends that her identity shall still be merged in that of her husband. In the two cases above cited we have already held that the legislative intent in the act of 1877 was to change the foundation of the legal status of husband and wife, and that the statute effects that change. In marriages which have occurred since the act took effect, the parties retain their legal identity, and their civil rights are to be determined in accordance with the status thus established. These rights, except so far as they are modified by the statute itself or by other statutes, or are necessarily affected by the reciprocal rights and obligations which are inherent in the relation of husband and wife, are the same as they were before marriage. The statute leaves nothing to implication. The right to contract with the husband and to sue him for breach of contract and to sue for torts is not given to the wife by the statute. There are rights which belonged to her before marriage; and, because of the new marriage status created by the statute, are not lost by the fact of marriage as they were under the common-law status. The status of the parties after marriage being fixed, there was no occasion for providing in express terms what the consequences would be. They followed logically.

In the Mathewson Case we held that a wife's right to contract with the husband and to sue him for breach of such contract followed necessarily from the fact established by the statute, that her legal identity

was not lost by her coverture. It is an equally necessary consequence of her retention of her legal identity after coverture that she has a right of action against her husband for a tort committed by him against her and resulting in her injury. Such a tort gives rise to a claim for damages. Such claim is property not in her possession but which she may by action reduce into her possession, just as she might before her coverture have had an action against him for such a tort committed before that event. The husband's delict, whether a breach of contract or personal injury, gives her a cause of action. Both necessarily follow from the fact that a married woman now retains her legal identity and all her property, both that which she possessed at the time of marriage and that acquired afterwards.

In the fact that the wife has a cause of action against her husband for wrongful injuries to her person or property committed by him, we see nothing which is injurious to the public or against the public good or against good morals. This is the usual test for determining whether a statute or a contract is against public policy. When a wife is allowed to possess and deal with her own property and carry on business in her own name like a feme sole, she ought to have the same right to contract and enforce her contracts, and the same remedies for injuries to her person and property which others have, and to be liable upon her contracts and for her torts the same as others are. This is the position in which she now stands. The danger that the domestic tranquillity may be disturbed if husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel, as suggested in some of the cases cited in behalf of the defendant, we think is not serious. So long as there remains to the parties domestic tranquillity, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such actions will be impossible. When the purposes of the marriage relation have wholly failed by reason of the misconduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give them against other persons. Courts are established and maintained to enforce remedies for every wrong upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature. No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another and one slander with another slander until the public peace is broken and the criminal law invoked against them. We find nothing to warrant the claim that public policy is opposed to the existence of a cause of action for a personal tort in favor of husband or wife against the other spouse, where the wife's identity is not merged in that of her husband. The plaintiff and defendant having married subsequent to April

20, 1877, the facts alleged in the complaint were not insufficient by reason of her coverture, and the demurrer should have been overruled.

There is error, the judgment is set aside, and the case remanded for further proceedings according to law. All concur.[4]

BUSHNELL v. BUSHNELL.

Supreme Court of Errors of Connecticut, 1925. 103 Conn. 583, 131 A. 432, 44 A. L. R. 785.

Action by Inez A. Bushnell against Mark W. Bushnell. Judgment for plaintiff for $2,000, and defendant appeals. Error, judgment set aside, and new trial ordered nisi.

MALTBIE, J. The plaintiff and defendant are husband and wife. She has brought her action to recover for personal injuries, which she alleges she suffered by reason of his negligence, and has secured a verdict. They were riding together in an automobile which he was driving, returning to their home in Thompsonville after taking their son to Brown College, where he was a student. The defendant momentarily fell asleep, with the result that the automobile ran off the highway and struck a tree at the side of the road, with consequent injury to the plaintiff. The plaintiff, who was riding on the front seat beside the defendant, was also asleep at the time of the accident, and had been for some time before. The defendant in his appeal makes four claims of substantive law, which he says invalidate the verdict: First, that a wife cannot maintain an action against her husband to recover damages growing out of his negligence; secondly, that the parties were engaged in a joint enterprise at the time of the injury; thirdly, that the defendant cannot be held to have been negligent because the accident was due to the fact that he momentarily dropped off to sleep while operating the automobile; and, fourthly, that the plaintiff was guilty of contributory negligence. [The court here quotes from the case of Brown v. Brown, 88 Conn. 42, 89 A. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70, supra, p. 428.]

While we were there dealing with an assault, that is, a willful tort, the language used was designed to apply broadly and to give the wife the same right to sue her husband for any tort committed by him that any other individual would have, except as that right is modified by statutory provision or is necessarily affected by the marriage relationship. The general language of the opinion must be read in the light of the exception, for doubtless there are certain mutual liabilities, and mutual rights as well, which inhere in the marriage contract, so that conduct which might be a tortious act as to third persons would, under certain circumstances, create no liability upon that ground as between husband and wife. But here the wife is seeking to recover damages for

[4] See note 5, p. 433, infra.

the negligence of her husband, who, for aught that appears, had the normal use of his faculties of mind and body, and who was engaged in the ordinary occupation of driving an automobile upon the highway. Such a situation falls, not within the exception, but within the broad principle of liability announced in the Brown Case. That principle has not been questioned since, and the dangers from it which we then refused to regard as substantial have not in fact made themselves manifest. We see no reason now to narrow the scope of the rule we then stated, and in compliance with it we hold that, aside from such cases as may be found to fall within the exception, a wife may maintain an action against her husband for personal injuries due to his negligence. * * *[5]

[5] The judgment was affirmed, upon condition that the plaintiff remit $300 from the amount of her judgment, for reasons appearing in the omitted portion of the opinion.

In accord with the majority opinion in Thompson v. Thompson, 218 U. S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921 (1910), supra, p. 422, that the wife cannot sue her husband even for an intentional tort, see Clark v. Clark (C. C. A.) 11 F.(2d) 871 (1925), libel and slander; Drake v. Drake, 145 Minn. 388, 177 N. W. 624, 9 A. L. R. 1064 (1920), injunction against wife's nagging refused; Austin v. Austin, 136 Miss. 61, 100 So. 591, 33 A. L. R. 1388 (1924); Allen v. Allen, 246 N. Y. 571, 159 N. E. 656 (1927), malicious prosecutions; Wilson v. Barton, 153 Tenn. 250, 283 S. W. 71 (1926), and In re Dolmage's Estate, 203 Iowa, 231, 212 N. W. 553 (1927), suit by wife's personal representative against husband for wrongfully killing wife.

In accord with Brown v. Brown, 88 Conn. 42, 89 A. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70 (1914), supra, p. 428, see Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 382, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772 (1916), felonious assault resulting in death, suit by administrator; Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920), infecting with disease.

Only a few states have decided, in accord with Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432, 44 A. L. R. 785 (1925), that a wife may sue her husband for a negligent tort. That she may, see Roberts v. Roberts, 185 N. C. 566, 119 S. E. 9, 29 A. L. R. 1479 (1923); Wait v. Pierce, 191 Wis. 202, 209 N. W. 475, 48 A. L. R. 276 (1926). In Maine v. James Maine & Sons Co., 198 Iowa, 1278, 201 N. W. 21, 37 A. L. R. 161 (1924), Riser v. Riser, 240 Mich. 402, 215 N. W. 290 (1927), and Emerson v. Western Seed Co., —— Neb. ——, 216 N. W. 297 (1927), it was held that a wife injured by the negligence of her husband, who was an employee of defendant, could not recover against defendant because she could not sue her husband; but the opposite conclusion was reached in Schubert v. August Schubert Wagon Co., 223 App. Div. 502, 228 N. Y. S. 604 (1928). In Newton v. Weber, 119 Misc. Rep. 240, 196 N. Y. S. 113 (1922), A negligently injured B, who sued him, then they intermarried. The court said a wife would not want to sue her husband for a negligent injury except as a "raid on an insurance company."

It is generally recognized that the husband cannot sue the wife for a tort, as the statutes have made no change in his rights. See Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772 (1916).

SMITH v. SMITH.

Supreme Court of Rhode Island, 1898. 20 R. I. 556, 40 A. 417.

Trover by a wife against her husband for his conversion of her personal estate. Heard on defendant's petition for a new trial.

MATTESON, C. J. This is an action of trover for the conversion of certain articles of household furniture and other goods, brought by the plaintiff, a married woman, against her husband. At the trial in the common pleas division a verdict was rendered in favor of the plaintiff. The case is now before us on the defendant's petition for a new trial, alleging that the court erred in its refusal to instruct the jury that the plaintiff could not maintain the action because at the time of the alleged taking of the goods she was the defendant's wife, to which refusal exception was duly taken. The other ground of the petition was not insisted on at the hearing.

An examination of Gen. Laws R. I. c. 194, "Of the Property Rights of Married Women," and Pub. Laws R. I. 1896–97, c. 335, in amendment of chapter 194, shows that the policy of the statute is to give to married women the entire control of their own property, free from any control or interference of their husbands, and to place them in that respect on the same footing as single women in the management of their property. Chapter 194, § 16, provides that "in all actions, suits and proceedings whether at law or in equity, by or against a married woman, she shall sue and be sued alone." We see no reason, therefore, why a married woman might not maintain an action against her husband for the conversion of her property as well as against another person for a like conversion. Our opinion is that the common pleas division did not err in its refusal to instruct the jury in accordance with the defendant's request.

New trial denied, and case remitted to the common pleas division with direction to enter judgment on the verdict.[6]

[6] Accord: Strength v. Thornton, 19 Ala. App. 475, 98 So. 206; Easterly v. Wildman, 87 Fla. 73, 99 So. 359 (1923), detinue; Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598 (1908), trover; Minier v. Minier, 4 Lans. (N. Y.) 421 (1871), ejectment.

Contra: Plotkin v. Plotkin, 2 W. W. Har. (Del.) 455, 125 A. 455 (1924), replevin.

Suits between husband and wife were maintainable in equity, before the Married Women's Statutes. Brooks v. Brooks, Precedents in Chancery 24 (1691), suit by husband; Stone v. Wood, 85 Ill. 603 (1877), suit by husband. See Gahm v. Gahm, 243 Mass. 374, 137 N. E. 876 (1922), where the court says that there must be some special equitable consideration, such as fraud, coercion, breach of trust, etc., and that equity will not enforce an ordinary legal claim, simply because it is not enforceable at law.

A wife whose husband, just before the marriage, conveyed his real estate with intent to deprive her of her dower, is entitled to a decree protecting her dower. Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059, 48 L. R. A. (N. S.) 512, Ann. Cas. 1914D, 290 (1913), with note. Cf., as to personal property conveyed by the husband just before death, Robertson v. Robertson, 147 Ala. 311, 40 So. 104, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051 (1905).

MAD.D.R.

BEASLEY v. STATE.

Supreme Court of Indiana, 1894. 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418.

[Alfred D. Beasley was charged by indictment with the larceny of money and a watch, the goods and chattels of his wife. A motion to quash the indictment was overruled and exceptions preserved by him. He was found guilty. Motion for new trial was overruled and judgment rendered, from which this appeal is prosecuted.]

DAILEY, J. [after finding that the verdict was sustained by the evidence, and stating the substance of the married women's legislation in Indiana, and the common-law rule about the unity of husband and wife, continued as follows:]

The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts and doing whatever a feme sole might do; and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficient statutes, a woman may hold her own property; make her own money; enter into her own contracts; pay her own debts. She may even contract with her own husband. If he defrauds her she may recover. If a woman may contract, under these statutes, with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that if performed by another it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them.

In Garrett v. State, 109 Ind. 527, 10 N. E. 570, the defendant was indicted for burning the property of "another person," to wit: The property of Hannah Garrett. The evidence showed that he and his wife Hannah, the owner of the dwelling house so destroyed, occupied, used, and dwelt therein, as their habitation, and yet this court said: "If a man unlawfully, feloniously, willfully and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute."

Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and if the husband can commit the crime of arson against her private property it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods.

In our opinion the judgment of the trial court should be, and it is, affirmed.[7]

[7] Contra: Thomas v. Thomas, 51 Ill. 162 (1869).

To the effect that a husband and wife cannot be guilty of a conspiracy with each other, see Dawson v. U. S. (U. S. C. C. A.) 10 F.(2d) 106 (1926).

HUSBAND OR WIFE AS WITNESSES FOR OR AGAINST EACH OTHER.—See note by John H. Wigmore, 19 Ill. L. Rev. 190, also Wigmore, Evidence (2d Ed.) §§ 600–620, 2227–2245, 2332–2341.

RIGHT OF HUSBAND TO CUSTODY OF HIS WIFE.—In The Queen v. Jackson, L. R. 1 Q. B. 671 (1891) a husband, whose wife refused to live with him, obtained a decree for restitution of conjugal rights, and seized his wife as she was leaving church, carried her to his home, and detained her there. He was ordered to set her free, on a writ of habeas corpus. As against third persons, however, either spouse has a right to the custody of the other. Parton v. Hervey, 1 Gray (Mass.) 119 (1854); Chace, Petitioner, 26 R. I. 351, 58 A. 978, 69 L. R. A. 493, 3 Ann. Cas. 1050 (1904).

It is not necessary to obtain the husband's consent to an operation on the wife, unless she is incompetent. See Burroughs v. Crichton, 48 App. D. C. 596, 4 A. L. R. 1529 (1919).

CHAPTER 4

THE TORTS AND CRIMES OF MARRIED WOMEN—LIABILITY OF HUSBAND AND OF WIFE

A HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS, AND THE MARRIED WOMEN'S PROPERTY ACT, by T. Cyprian Williams, Law Quarterly Review, vol. 16, pp. 191, 192: "At common law, a wife was not under any incapacity in respect of wrong like her incapacity in respect of contract. She had the obvious human capacity of doing harm to others; and she was perfectly competent at law to incur an obligation ex delicto. And if she incurred such an obligation, it attached properly upon herself, and not upon her husband. For a tort committed by a wife was, and is, no cause of action against her husband; but it was, and is, a good cause of action against herself. See Keyworth v. Hill, 3 B. & A. 685; Vine v. Saunders, 4 Bing. N. C. 96; Catterall v. Kenyon, 3 Q. B. 310; Capel v. Powell, 17 C. B. N. S. 743. In consequence, however, of the general common-law rule, that a married woman could not sue or be sued by herself alone, it was necessary, on suing a wife for her tort, to join her husband as co-defendant. Bac. Abr. tit. Baron and Feme (L); Head v. Briscoe, 5 C. & P. 484; 38 R. R. 841; 2 L. J. (N. S.) C. P. 101. If the action were successful, judgment was given against the husband and wife jointly. The wife was personally liable upon such a judgment just as much as the husband; and before the abolition of imprisonment for debt, she might have been taken in execution and imprisoned to satisfy such a judgment, whether her husband were also taken in execution or not. Finch v. Duddin, 2 Stra. 1237; Ferguson v. Clayworth, 6 Q. B. 269; Newton v. Boodle, 9 Q. B. 948; Newton v. Boodle, 4 C. B. 359; Larkin v. Marshall, 3 Ex. 804. The court would exercise its discretion in discharging the wife, if she had no separate property, but otherwise not. Edwards v. Martyn, 17 Q. B. 693; Ivens v. Butler, 7 E. & B. 159; Ex parte Butler, Jay v. Amphlett, 1 H. & C. 637. And the wife's liability for her torts continued after her husband's death or the dissolution of the marriage, when she might be sued alone in respect of them. But the husband's liability for his wife's torts was a mere consequence of his liability to be sued jointly with her. If the wife died or the marriage were dissolved, the husband could no longer be sued for his wife's tort, and any action commenced during the marriage upon such a cause of action at once abated. So that a husband sued jointly with his wife for her tort escaped all liability if his wife died before judgment. See Hardres, 161; Baron v. Berkley, 1 Lut. 670; Capel v. Powell, 17 C. B. N. S. 743."

KOSMINSKY v. GOLDBERG.

Supreme Court of Arkansas, 1884. 44 Ark. 401.

SMITH, J. This action was against the husband alone for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: (1) Where the husband is absent and had no knowledge of the intended act, as in Head v. Briscoe, 5 Carr. & Payne. 484, 24 E. C. L. R. 667, where a man was held answerable for a libel published by his wife, although they were permanently living apart. See, also, Catterall v. Kenyon, 3 Q. B. 309, 40 E. C. L. R. 749. (2) Where the husband is absent, but where the tort is done under his direction and instigation, as in Handy v. Foley, 121 Mass. 259, 23 Am. Rep. 270. (3) Where the husband was present, but the wife acted of her own volition, of which Cassin v. Delany, 38 N. Y. 178, is an example. And (4) where the tort is committed in the company of the husband, and by his command or encouragement; for instances of which see Daily v. Houston, 58 Mo. 361; Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presense, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Com. 149, where it is said, "If committed in his company, or by his order, he alone is liable."

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states prima facie a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or

influence her act. Pomeroy's Remedies, § 320; Bliss on Code Pleading, § 85.

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. Gantt's Dig. § 1233; Edwards v. State, 27 Ark. 493.

Judgment reversed, with directions to require defendant to answer the amended complaint.[1]

NORRIS v. CORKILL.

Supreme Court of Kansas, 1884. 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489.

[Action for slander against husband and wife. Demurrer to the petition sustained, and cause dismissed as to the husband. Plaintiff excepted, and brings the cause to this court.]

HORTON, C. J. The question presented in this case is, whether the husband is liable for the slanderous words spoken by his wife when he is not present and in which he in no manner participates. The rule of common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is, that the husband is entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife, by her marriage, is entirely deprived of the use and disposal of her property and can acquire none by her industry; that her person, labor and earnings belong unqualifiedly to the husband. Reeve's Domestic Relations, 3; Tyler, Infancy and Coverture, § 233.

Again, the husband by common law might give the wife moderate correction, for, as he was to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining

1 Accord: Wife not liable, Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772 (1863); Emmons v. Stevane, 73 N. J. Law, 349, 64 A. 1014 (1906).

The presumption of coercion is rebuttable. Marshall v. Oakes, 51 Me. 308 (1864); Smith v. Schoene, 67 Mo. App. 604 (1896).

A similar doctrine of coercion applies in criminal law. Where the married woman acts under the compulsion and coercion of her husband and in his presence, she is not criminally liable. Commonwealth v. Feeney, 13 Allen (Mass.) 560 (1866); except in cases of treason and murder, Bibb v. State, 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88 (1891). Compulsion is presumed when she acts in the presence of her husband, State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498 (1901); except perhaps in the case of perjury, Commonwealth v. Moore, 162 Mass. 441, 38 N. E. 1120 (1894). The presumption is rebuttable, Welch v. State, 197 Ind. 258, 150 N. E. 761 (1926); Commonwealth v. Eagan, 103 Mass. 71 (1869); State v. Jones, 53 W. Va. 613, 45 S. E. 916 (1903).

In Kentucky, the presumption no longer exists, the court saying that the change in the status of married women by the statutes has removed it. King v. City of Owensboro, 187 Ky. 21, 218 S. W. 297 (1920). See, also, Dawson v. U. S. (C. C. A.) 10 F.(2d) 106 (1926), and a note in 33 Yale L. J. 670. On the criminal responsibility of the husband for the wife's violation of liquor laws, see State of Washington v. Arrigoni, 119 Wash. 358, 205 P. 7, 27 A. L. R. 310 (1922).

her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. 1 Bl. Comm. (Wendell's Ed.) 444, 445.

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of complete dependence; could not contract in her own name; was bound to obey him, and her legal existence was merged in that of her husband so that they were termed and regarded as one person in law. Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Tyler, Infancy and Coverture, ch. 19, §§ 216–223.

Under the statute of Kansas—

"The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts." Comp. Laws 1879, c. 62, § 1.

"A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent and with like effect, as a married man may in relation to his real and personal property." Section 2, c. 62, supra.

"Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name." Section 4, c. 62, supra.

In addition, section 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were unmarried. Therefore it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property; nor is she prohibited from acquiring property by her own industry. It is not true under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion

over her personal property, her labor, or her earnings. If she so desires, they are unqualifiedly her own, and he cannot interfere with them.

Again, in this state, the common-law power of correction of the wife by the husband is no longer tolerated. Under the common law, the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute nonentity, and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself." Martin v. Robson, supra. Our conclusion is that the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. In this state the wife stands upon an equality, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words and her acts.

We have examined the various authorities conflicting with these views, but owing to the provisions of our statute we are not inclined to follow them, and therefore think it unnecessary to refer to them.

The judgment of the district court will be affirmed. All the Justices concurring.[2]

SARGEANT v. FEDOR et al.

Supreme Court of New Jersey, 1925. 130 A. 207.

Action by John Sargeant against Mary Fedor and another. Judgment for plaintiff and defendants appeal. Affirmed.

Argued March term, 1925, before TRENCHARD, MINTURN, and LLOYD, JJ.

PER CURIAM. This action was tried by the court, without a jury, resulting in a judgment for the plaintiff against both defendants for $100. Then action was brought against the defendants, husband and wife, for alleged slander by the defendant wife as follows: "He [the plaintiff] stole a piano; he is a thief." The contention is that error was committed in the refusal to direct a verdict in favor of the defendant husband, inasmuch as the court found that the slander was the wife's voluntary tort, not uttered in the husband's presence nor at his command. At common law the husband was jointly liable for the voluntary torts of his wife, and this rule has not been abrogated in this state by express statute.

[2] See note 3, infra, p. 442.

By the weight of authority the general property acts relating to married women do not change, by implication, the husband's common-law liability for his wife's torts (13 R. C. L. p. 1233, § 268; 30 C. J. p. 787, § 417; 27 A. L. R. 1218, note; Ann. Cas. 1915D, 1206, note), nor the common-law rule that one spouse may not sue the other in tort (Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1482). But, since the passage of the married women's acts, a husband is not liable for the torts of his wife, growing out of the conduct by her of her own business or arising from the management by her of her separate property. Harrington v. Jagmetty, 83 N. J. Law, 548, 83 A. 880.

This tort in question, however, is not included in the statutory exceptions in this state, and the husband's liability therefore persists, viz. that punitive damages may be assessed against the husband, though he in no way participated in the wife's tort. 13 R. C. L. 1237, § 273. Some states take a contrary view. Price v. Clapp, 119 Tenn. 425, 105 S. W. 864, 123 Am. St. Rep. 730; Waskey v. Chambers, 224 U. S. 564, 32 S. Ct. 597, 56 L. Ed. 885, Ann. Cas. 1913D, at page 998. But since the common-law rule of liability is adhered to in this state, as against the husband, the consequent rule of common-law damage is equally applicable.

The judgment will be affirmed.[3]

[3] The authorities which are in conflict are collected in a note by James Parker Hall in 20 Ill. L. Rev. 80, commenting on the case of Edwards v. Porter, [1925] A. C. 1. The question is settled by statutes in some states.

In Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623 (1914), it was held that, where W, the wife of H, alienated the affections of X, the husband of Y, H was not responsible to Y for the tort, because he was also a victim of it. See, however, Burnett v. Cobb (Tex. Civ. App.) 262 S. W. 826 (1924).

At common law, the husband was liable for his wife's torts committed before marriage. Hawk v. Harman, 5 Bin. (Pa.) 43 (1812). In a few states, by statute, a husband is exempted from liability for his wife's "antenuptial torts," in some for her "torts," in some for her "debts and liabilities," and in some for her debts. Judicial application of these statutes, or the other Married Women's Statutes, to the case of antenuptial torts, seems to be lacking.

CHAPTER 5

DUTY OF HUSBAND TO SUPPORT WIFE—AUTHORITY OF WIFE TO MAKE CONTRACTS FOR HUSBAND AS HIS AGENT

LANE v. IRONMONGER.

Court of Exchequer, 1844. 13 Mees. & W. 368.

Debt for goods sold and delivered.

Plea, except as to £15., never indebted; and as to that sum, payment of money into Court.

At the trial, before Pollock, C. B., at the Middlesex Sittings after last Trinity Term, it appeared that the action was brought to recover the sum of £5287. for various articles of millinery, viz. bonnets, feathers, lace, and ribands, supplied by the plaintiff to the defendant's wife, during part of the year 1843. It further appeared that the defendant's wife had a separate fortune, though she and her husband were living together; and that the plaintiff, having been induced to make inquiry, was told he had £1100. per annum. There was no evidence of any express authority given by the husband to his wife to order the articles in question. Under these circumstances, it was contended for the defendant, that, as the articles ordered by the defendant's wife were excessive in amount, and there was no evidence of any express authority given by him, the jury ought not to infer that the wife had any implied authority from her husband to order the goods; and the direction of Lord Abinger, C. B., to the jury, in the case of Freestone v. Butcher, 9 Car. & P. 647; was relied upon. The learned Judge having read that direction to the jury, told them that he approved of and adopted it; and the jury thereupon found a verdict for the defendant.

Humfrey now moved for a new trial, on the ground of misdirection.—The direction of the learned Judge in this case proceeded upon the doctrine laid down by Lord Abinger, C. B., in Freestone v. Butcher, which it is submitted, is not correct in law, and cannot be supported. His lordship there says, "The general rule is, that a wife cannot bind her husband by her contract, except as his agent. There are, however, cases in which a jury may infer such agency. In the cases of orders given by the wife in those departments which she has under her control, the jury may infer that the wife was the agent of her husband till the contrary appear. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appears to the contrary, the jury do right in inferring the agency; but if the order is excessive in point

of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which a jury would infer that there was no agency. The tradesman who supplies the goods takes the risk; and if the bill is one of an extravagant nature, such as the husband would never have authorized, that would be alone sufficient to repel the inference of agency." So unqualified a doctrine cannot be maintained. [PARKE, B.—It is because she is the agent of her husband that the tradesman ought to be careful not to supply her to an extravagant extent, for her giving orders to such an extent would go to show she was not acting as the husband's agent, and to the extent authorized by him.] The case of Freestone v. Butcher seems to carry the law as to the husband's exemption from liability further than any of the cases which have preceded it. This is a case in which the husband and wife are living together, and it may fairly be presumed that he had seen these articles of dress worn by his wife. In Montague v. Benedict, 3 B. & Cr. 635; it is said that "cohabitation is presumptive evidence of the assent of the husband; but it may be rebutted by contrary evidence." In that case there was evidence to rebut the presumption, and the contract was held not to be within her authority. [POLLOCK, C. B.—How can you distinguish between clothes and rings, which are both ornamental? Jewellery may be just as fit to be ordered by a lady as lace or any other article of dress. PARKE, B.—The only question is, whether the extravagance of the bill is an element to be taken into consideration by the jury, in considering the question of the wife's agency. Surely it is.] It was incorrect in the learned Judge to say, in the words of Lord Abinger's ruling that the extravagance of the bill "would be alone sufficient to repel the inference of agency."

PARKE, B. There may be a trifling inaccuracy in the report in the case of Freestone v. Butcher, in stating that the extravagance of the bill would alone repel the inference of agency; that alone, perhaps, would not be sufficient; but it may be repelled by that and other circumstances together. The law as there laid down is substantially correct. The whole turns upon the question of the husband's authority; and it is for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied her with these articles, must not have known that she was exceeding her husband's authority to pledge his credit. If he had any doubts upon the subject, he might have made inquiries of the husband. It was not proved that the husband knew the articles had been ordered, or saw his wife wearing them.

POLLOCK, C. B., and GURNEY, B., concurred.

Rule refused.

WANAMAKER v. WEAVER.

Court of Appeals of New York, 1903. 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621.

Action by John Wanamaker against Simon J. Weaver. From an order of the Appellate Division reversing a judgment for defendant and granting a new trial (76 N. Y. S. 390), defendant appeals. Reversed.

HAIGHT, J. This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that, while the goods might ordinarily be deemed necessaries, they were not in fact such, for the reason that the defendant lived on a salary of $2,000 per year, out of which he delivered to his wife $1,500 in monthly installments of $125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled, and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the purchase, and therefore the articles were not necessary for her support and maintenance. The majority of the judges of the Appellate Division appear to have entertained the view that, if the articles purchased by

the wife were of the character ordinarily deemed necessaries, such as clothing, table linen, towels, and napkins, the merchant was at liberty to furnish her therewith, and charge her husband therefor, without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination, and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase." It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of Keller v. Phillips, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of Cromwell v. Benjamin, 41 Barb. 558, the General Term sustained the right of a merchant to recover of the defendant for the necessaries furnished to his wife. J. C. Smith, J., in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessaries furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessaries himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries." In Bloomingdale v. Brinckerhoff, 2 Misc. Rep. 49, 20 N. Y. S. 858, it was held that, in order to entitle the tradesman to recover from the husband, it was incumbent upon him to show that "the articles supplied to the wife were not only of the kind usually denominated necessaries, because their need is common to all persons, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states, bearing upon the liability of the husband for necessaries, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where

the question appears to have been more thoroughly considered in the higher courts. In the case of Debenham v. Mellon, 5 Q. B. Div. 394, Bramwell, L. J., in stating the question involved, says: "The goods were necessaries in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessaries in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable; as, for instance, where he turns his wife out of doors, or conducts himself in such manner as to oblige her to leave him, she may provide herself at his expense, and pledge his credit for necessaries, such as food, apparel, lodging, and medicine. In case they are living and cohabiting together, and there has been a custom of contracting short credit as to a class of articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relation as the head of his household; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable.

The same case was subsequently brought up for review in the House of Lords. 6 Appeal Cases, 24. Lord Chancellor Selborne then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that: "According to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity—a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her; but not when the husband and wife are living together, and when the wife is properly maintained, because there is, in that state of circumstances, no prima facie evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive or supplying herself with lodging or clothing." The second question considered by the Lord Chancellor was whether the law implied such a mandate from the fact of cohabitation. Upon this point he says: "If, therefore, the law did imply any such mandate from cohabitation, it must be an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which show that the ordinary state of cohabitation between husband and wife does carry with it some presumption—some prima facie evidence—of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, * * * because in that state of circumstances the husband may truly be said to do acts or habitually to consent to acts, which hold the wife

out as his agent for certain purposes. * * * But where there has been nothing done—nothing consented to by the husband—to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himseld as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted, he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption prima facie, and not absolute; not a presumption of law, but one capable of being rebutted." The Chancellor then proceeds to consider the facts in the case, and concludes by holding the husband not liable, stating that: "It was argued that, because these articles were found to be in some sense necessaries in their nature, the husband ought, therefore, to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife, and duly paid it; much less can he be bound in a case like this, where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing."

In the still more recent case of Morel Brothers and Company, Limited, v. The Earl of Westmoreland, 1 K. B. (1903) 64, it was held that the presumption which arises that the husband had given the wife authority to pledge his credit for necessaries may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses. In this case Mathew, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases, but, if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife, § 107, sums up the authorities upon the subject as follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessaries, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessaries shall come, and that, so long as he has provided necessaries in some way, his marital obligation is discharged,

whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessaries at his own home he is not liable to provide them elsewhere. In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject, see 10 Cent. Law J. 341; 54 Cent. Law J. 472; 18 Am. Law Reg. (N. S.) 412–416 (Judge Bennett's note); 20 Am. Law Reg. (N. S.) 324 (Judge Bennett's note); Clark v. Cox, 32 Mich. 204.

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor;[1] that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in the alarm which appears to have possessed the learned justices of the Appellate Division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor, or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The

1 Or had arranged for credit at other stores and forbidden the plaintiff to extend credit to his wife, Woodward v. Barnes, 43 Vt. 330 (1871). But see Rotering v. Hibbard, 168 Minn. 502, 210 N. W. 395 (1926), where the husband, who had supplied his wife with cash, and forbidden the plaintiff to extend credit, was held liable under a statute making a husband liable for "necessaries." See comment in 11 Minn. L. Rev. 279.

judgment of the Appellate Division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

GRAY, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., dissents. MARTIN, J., absent.

Judgment reversed, etc.

JOHNSON v. BRISCOE.

St. Louis Court of Appeals, Missouri, 1904. 104 Mo. App. 493, 79 S. W. 498.

Action by E. Johnson against J. S. Briscoe. From a judgment in favor of plaintiff, defendant appeals. Reversed.

GOODE, J. This controversy is over the purchase price of a gold watch which was bought by the defendant's wife from the plaintiff, a dealer in general merchandise, in the town of Argola, in Lewis county. A long account, ranging over a year or two, and made up of items of merchandise purchased and payments made by the defendant, was filed. The defendant paid for all the items of the bill, except the watch. He refused to pay for that, asserting that it was bought by his wife without authority. The defendant is a farmer in moderate circumstances—worth four or five thousand dollars. He had been married 16 years when this litigation arose, and had two daughters. So far as the evidence discloses, he and his wife got along without trouble. His provision for his family, of food, clothing, comforts, and conveniences, was like that of other farmers of the vicinity, and suitable to his estate and social degree. As we gather, the defendant and his family are people of average means and station, of respectable conduct, and enjoy the esteem of their neighbors. Briscoe had been dealing with Johnson for several years, and Mrs. Briscoe was in the habit of buying household supplies, clothing, and such other articles as the family needed, on her husband's credit, all of which he had paid for without complaint until the watch was bought. There was no testimony to show that Mrs. Briscoe's purchases had included, previously, jewelry or other articles of an ornamental kind. A farmer who lived near the defendant's home was permitted to testify, against the objection of the defendant, that his daughters carried watches. A great deal of testimony was introduced to show the circumstances of the defendant, and the station in life occupied by his family, the purport of which has been stated above. Under the instructions given to them, the jury returned a verdict for the plaintiff, and the defendant appealed.

This instruction will illustrate the rule for ascertaining the defendant's responsibility given to the jury: "If you find from the greater weight of the evidence that the watch purchased by defendant's wife of plaintiff, and charged to defendant, was necessary and proper to equal her in adornment to her neighbors, or the women generally of her neighborhood, of her condition and standing in life and society, then it

would be a necessity, in the meaning of the law, and your verdict should be for the plaintiff; otherwise it should be for the defendant. The question is not what defendant would consider necessary, and would willingly provide. The question is, under all the circumstances and surroundings and associations, was the purchase reasonable for the wife of one circumstanced, situated, and surrounded as defendant had surrounded, circumstanced, and placed his wife—was it reasonably necessary for her comfort and pleasure, under the style or mode of life adopted and chosen by her husband?"

It is impossible to collect from the books a theory of the husband's liability in cases like this, and a rule of decision applicable under all circumstances. The power of a wife to pledge her husband's credit is rested sometimes on his legal obligation arising from the conjugal relation to provide her with necessaries. Sauter v. Scrutchfield, 28 Mo. App. 150; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Raynes v. Bennett, 114 Mass. 424; Arnold v. Allen, 9 Daly, 198; Cromwell v. Benjamin, 41 Barb. 558; Reeve, Domestic Relation (4th Ed.) 114. In other cases the courts have preferred to found the wife's power on an agency, expressed, implied, or presumed, by virtue of which she may bind the husband to pay for articles she buys on his credit. Jolly v. Rees, 15 C. B. 628; Montague v. Benedict, 3 B. & C. 631; Debenham v. Mellon, 6 App. Cases, 24; Lane v. Ironmonger, 13 M. & W. 368; Seaton v. Benedict, 5 Bing. 28; Reid v. Teakle, L. R. 13 C. B. 627; Atkins v. Curwood, 7 C. & P. 756; Freestone v. Butcher, 9 Car. & P. 643; Harshaw v. Merryman, 18 Mo. 106; Reese v. Chilton, 26 Mo. 598; Shelton v. Hoadley, 15 Conn. 535; Shelton v. Pendleton, 18 Conn. 417; Fredd v. Eves, 4 Har. 385; Sawyer v. Cutting, 23 Vt. 486; Compton v. Bates, 10 Ill. App. 78.

Each theory appears to be properly applied to cases presenting facts of a certain character, and to be inapplicable under other circumstances. If a husband refuses to provide for a wife, casts her off, or notifies merchants not to sell her goods on his credit, she may nevertheless supply herself with necessaries at his expense; but she cannot be said to do so as his agent or by his authority, except as a legal fiction. But if the two are living together in the family relation, she may possess either actual or ostensible authority to make purchases in his name, and, to the extent she has such apparent or real authority, he will be bound by the contracts she makes. Obviously the instance of a wife dwelling apart from her husband, or of one living with a husband who refuses to support her, and the instance of a wife and husband living amicably and co-operating in the transaction of family affairs, present situations entirely unlike, and call, therefore, for the use of different principles of law to determine whether and how far the husband's credit may be pledged by the wife. Take this case. The defendant and his wife were dwelling together contentedly, so far as appears, and he was providing for the wants and comfort of his family, including herself, to their satisfaction, or at least without complaint. There was no proof that

she had ever asked him to get her a watch, or that he was unwilling to get her one. There may be a good reason why, at a particular time, it is inexpedient for a man to purchase such an article, useful but not indispensable, though he may be perfectly willing to purchase it when his affairs permit. He certainly ought to have something to say about what debts he will incur, if he is providing for his family according to his means. Nor is it conclusive of his duty that wives of persons of his fortune and station have watches. That fact by no means determines that he has been so remiss in not providing one for his wife that she may get it on his credit, as a thing of necessity. The case is very different when a man's neglect is a source of distress to his wife, whether she has been abandoned or is living with him.

With facts like those we have before us, we think the power of a wife to pledge her husband's credit must rest on an agency, either express or implied. Everything Mrs. Briscoe bought from the defendant was sold to her on the assumption, not that she was unsuitably provided for or was suffering, but as one having authority to pledge her husband's credit for such articles as she was accustomed to buy. The better decisions declare the law to be that when husband and wife are living together, with the family relation undisturbed, and he is making such provision as excites no comment among their friends and no complaint from her, the question of her right to pledge his credit for any purchase depends on her actual or ostensible authority, and is to be determined by the rules of the law of agency. This was the conclusion of very eminent judges in dealing with the subject in cases similar to this one, and of recent date, and in which the decisions were reviewed for the purpose of settling the law for the realm of England. Debenham v. Mellon, 6 App. Cases, 24; Jolly v. Rees, 15 C. B. 629. It was said in the Debenham Case that the adjudications will be found to agree if negligible dicta in the opinions are overlooked, and we have found that the most of the American decisions lay down the rule adopted by the English courts. This doctrine is the more expedient, inasmuch as nowadays wives are usually given wide liberty to supply themselves with what they need, and there is not much disagreement or litigation over such matters.

The remaining question is, were there facts sufficient to raise an inference in fair minds that Mrs. Briscoe had authority to buy the watch on the defendant's credit, or such an appearance of it as justified the plaintiff in assuming that she had? In the absence of notice to the contrary, the law will imply authority on the part of a wife who is living with her husband to buy such articles on his credit as pertain to the household arrangements, which are commonly under a wife's care. Ruddock v. Marsh, 1 H. & N. 601; Montague v. Benedict, supra. Or, as has been said, she is presumed to have all the usual authorities of a wife (Johnston v. Sumner, 3 H. & N. 261), or to have authority to purchase necessaries on the husband's credit as his agent (Harshaw v.

Merryman, 18 Mo. 106).[2] Such presumptions are not conclusive, but are really inferences of fact, for the husband may prove he made suitable provision or furnished a reasonable allowance of money to his wife, and this will disprove her authority to bind him—certainly if the plaintiff sold her with knowledge of the facts, and perhaps if he was ignorant of them. Jolly v. Rees and Debenham v. Mellon, supra. When the parties are maintaining conjugal relations, the necessity of the wife's purchase may be a material circumstance to prove her authority. The cases seem to take into account the fortune and social standing of the parties for the same purpose; that is, as tending to prove an authority in the wife, actual or ostensible, to buy the article in dispute on the husband's credit.

The ambiguity of the law flows from the uncertain and fluctuating meaning of the word "necessaries." As to necessaries, in the sense of the old cases (that is, food, clothing, shelter, medical attendance, and such things as every one must have), there can never be a question of a wife's right to provide them if her husband does not. The law holds that, among the various obligations a man may be under, the primary one is to support his family. Hence our homestead and exemption statutes. And whether a woman is treated, by legal fiction, or by an inference from the facts, as an agent in the matter, or is regarded as exercising a prerogative attached by the law to the status of wife, is, for practical purposes, immaterial, though the agency notion is theoretically unsound, for such indispensable things may be furnished at the husband's cost, notwithstanding a notice from him not to furnish her. But when necessaries are taken to mean not only articles of strict necessity, but those needed to equalize the wife in comfort to other women of her condition, an element of uncertainty is introduced. For, when is a man bound to provide such things, and who shall judge if he was delinquent? Shall he, his wife, a merchant, or a jury, decide the matter? If the question is remitted in every instance to a jury to say that the husband is or is not bound, accordingly as they may deem the articles purchased to be necessary or the reverse, a privilege of no defined limits to use her husband's credit will be accorded to the wife, and his financial affairs largely taken from his control. The sounder doctrine is that the husband's responsibility does not stand on the question of necessity in a case like this, but, as said, on the wife's agency. The necessity of the article bought, the means of the parties, their condition in life, and the previous conduct of the husband with reference to the wife's purchases in his name, all enter into the inquiry, as circumstances bearing on the measure of authority she has received, or appears to have received from him. We hold this case should be referred to the jury on such evidence, to say whether Mrs. Briscoe acted within the scope of her ostensible or actual agency when she bought the watch.

[2] Accord: Adkins v. Hastings, 138 Md. 454, 114 A. 288 (1921); Annis v. Manthey, 234 Mich. 347, 208 N. W. 453 (1926), semble.

The instructions given at the trial went further than this rule, and made the defendant answerable if the watch was needed to adorn the defendant's wife like her neighbors and women in the same social sphere.

The evidence as to the daughters of a witness wearing watches was incompetent, as not bearing on the issue, and apt to mislead the jury. Raynes v. Bennett, 114 Mass. 424; Compton v. Bates, 10 Ill. App. 78. Neither was the testimony as to defendant's wife milking cows and doing other work about the farm competent.

There is some evidence in this record from which the inference might be drawn that the watch was sold on the credit of Mrs. Briscoe, for one witness swore Johnson said he knew he would get his money; that she was in the habit of paying her bills, and of borrowing money to do so. Of course, if the sale was made on her credit, and not on that of her husband, she alone is responsible for the price.

The judgment is reversed, and the cause remanded for a trial in accordance with this opinion.[3]

BLAND, P. J., and REYBURN, J., concur.

LANYON'S DETECTIVE AGENCY, Inc., v. COCHRANE et al.

Supreme Court, Appellate Division, First Department, 1924. 210 App. Div. 590, 206 N. Y. S. 392.

Appeal from Appellate Term, First Department.

Action by Lanyon's Detective Agency, Inc., against John Cochrane and another. From a determination of the Appellate Term affirming a judgment against named defendant in the City Court of the City of New York for $2,162.92 on the verdict of a jury for plaintiff and against named defendant for $2,011.69, named defendant, by permission of Appellate Division, appeals. Affirmed.

See, also, 199 N. Y. S. 482.

MERRELL, J. The action was brought by the plaintiff against the appellant and Emma E. Cochrane, the wife of the appellant, to recover for services rendered by the plaintiff as a private detective in shadowing and conducting an investigation of the acts and conduct of the defendant appellant during a period from about October, 1921, to on or about the 20th day of February, 1922, and in connection with an action then pending for a separation wherein the said Emma E. Cochrane was plaintiff and the defendant appellant was defendant. There were two trials of the present action in the City Court. On the first trial the jury found a verdict for the amount claimed by the plaintiff against the defendant appellant, which verdict was set aside by the justice presiding at the trial. Upon the present trial, the jury found the aforesaid verdict against the defendant appellant and by their ver-

[3] Furniture may be a necessary. Jordan Marsh Co. v. Cohen, 242 Mass. 245, 136 N. E. 350, 24 A. L. R. 1480 (1922).

dict found in favor of the defendant Emma E. Cochrane. Judgment was entered in the City Court in favor of the plaintiff and against the defendant appellant, and therefrom an appeal was taken to the Appellate Term, which unanimously affirmed the judgment of the City Court. This appeal is from the order and determination of affirmance of the Appellate Term.

The cause of action set forth in the complaint arises out of a claim by the plaintiff for detective services and disbursements incurred in shadowing the defendant appellant after the latter had confessed to his wife, the defendant Emma E. Cochrane, his infatuation for another woman, and upon his declaration that he did not intend again to live with his said wife, and suggesting a divorce. Under the authority of sections 211 and 213 of the Civil Practice Act, the plaintiff joined both the husband and wife as parties defendant. The theory of the plaintiff upon which a recovery has been had from the defendant appellant, John Cochrane, was that the services rendered to the wife in shadowing her husband were necessaries, in that they were needed for her protection and support, and that the wife pledged her husband's credit therefor. The plaintiff also in its action sought a recovery from the defendant Emma E. Cochrane upon her employment of the plaintiff and an implied promise on her part to pay for the plaintiff's services and necessary disbursements. By paragraph 21 of the complaint, the plaintiff alleges doubt as to the person from whom he was entitled to recover and that both defendants are joined in the action with the intent that the question as to which of the defendants was liable and to what extent be determined as between the parties.

Upon the trial the defendant, although present, did not testify, nor was any testimony offered in defense of plaintiff's claim. Counsel for the defendant appellant conceded upon the trial that the defendant appellant was in fact shadowed by the plaintiff and its operatives at the time and place charged in the bill of particulars herein, and that the prices charged for such services and disbursements were fair and reasonable in amount. The questions at issue, therefore, were as to whether or not the services rendered by the plaintiff were necessaries and required for the protection, comfort, and support of the appellant's wife, and as to whether such services were rendered by the plaintiff upon the credit of the defendant appellant. These questions under the testimony were submitted to the jury by the court as questions of fact and were by the jury resolved against the defendant appellant. * * *

Upon the question as to whether or not the services rendered by the plaintiff were a necessary and were required for the comfort, protection, and support of the defendant, I think the testimony was sufficient to present a question of fact as to that for the determination of the jury. At the time these services were rendered the defendant Emma E. Cochrane had brought an action for a separation against her husband. In her complaint at great length she sets forth facts and circumstances showing her abandonment by the defendant appellant.

She also sets forth in her complaint allegations showing acts of misconduct on the part of the defendant which, if true, would have entitled her not alone to a separation, but to an absolute divorce from her husband. The allegations of the complaint of Mrs. Cochrane set forth at length the particulars of the past life of the parties, the entry into their life of another woman, and the confession of the defendant appellant of his infatuation for the other woman, his pleadings with his wife to allow him a year of contact and intercourse with the other woman to discover whether or not it was merely an infatuation which he had for the woman, and if so then he would return to his lawful wife and daughter and live with them; that, if it should turn out that the infatuation which he bore for this other woman was sincere and reciprocated, then a divorce would be granted between the husband and wife; that he stated to his wife that in an effort to cure him of his infatuation he was taking Christian Science treatment, but it was apparently of no benefit to him. Innumerable cases of adultery are set forth by the wife in her complaint charging her husband with keeping this woman and living with her in adulterous intercourse.

Under such circumstances, the question is presented whether or not, in order to enable the wife to prosecute her action and for her protection, it was necessary for her to employ the services of the plaintiff. If it was, then the plaintiff was entitled to recover. The question was submitted to the jury by the trial court as a question of fact for their determination, as to whether or not the services of the plaintiff were a necessary and were required for the protection of the wife. As before stated, the defendant appellant did not take the stand at the trial, nor did he deny that he told his wife he was in love with another woman or of his infatuation for her. Subsequently, by the consent and appearance of the defendant appellant in court, judgment was rendered against him for a separation because of his abandonment of his wife. At the time of the rendition of the services of the plaintiff the wife was uninformed as to the course that the separation action would take. The defendant appellant had interposed an answer practically placing at issue every allegation of his wife's complaint. The testimony of the plaintiff's president and one of his operatives, which was undenied by the defendant appellant, was that on several occasions when the defendant appellant was being shadowed, he was found with his enamorita, and that they occupied on several nights an apartment on Eighty-Fourth street. Plaintiff's president testified that shortly before the trial of the separation suit he called upon the defendant appellant at his office, and, without divulging his name, plaintiff's president told him he was a friend of the appellant's wife and that he then told the defendant appellant of his known relations with the young woman, to which the defendant appellant replied that he did not believe he had done anything wrong with the girl or that he had any wrong to right; that she was a wonderful woman and a charming companion.

By reason of the knowledge gained by Mrs. Cochrane through the

services of the plaintiff, she was enabled to secure protection to her person and to obtain relief through the separation action which she had brought and to obtain an allowance therein of $8,000 per year for her support. It is extremely doubtful whether she would have obtained the relief in her action except for the rendition of the services of the plaintiff. Under such circumstances, I think the jury was justified in finding that the detectives' services were a necessary, and under the testimony of Elder that they certainly were justified in finding that the wife through Elder, her attorney, had pledged her husband's credit, and that the jury was also justified under the testimony in finding that the husband had not made sufficient provision for his wife to pay for such services as were thus rendered necessary by his conduct. If the services of the plaintiff were necessary for the protection of the wife of the defendant appellant, then clearly she had a right to pledge her husband's credit therefor. Bishop on Marriage and Divorce, vol. 1, § 551, p. 433; Bishop on Married Women, § 403; Naumer v. Gray, 28 App. Div. 529, 51 N. Y. S. 222; Clark on New York Law of Contracts, vol. 2, § 1135 * * *.

From the foregoing authorities, I am of the opinion that the services of the plaintiff were necessary for the support and protection of the wife of the defendant appellant, and that the determination of the Appellate Term and the judgment of the City Court should be affirmed, with costs.[4]

Order filed.

CLARKE, P. J., and McAVOY, J., concur.

DOWLING and SMITH, JJ., dissent.

DOLAN v. BROOKS.

Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 350, 47 N. E. 408.

Contract to recover the price of a dress furnished by the plaintiff to the wife of the defendant. The case was tried without a jury. There was evidence tending to support the claim. The defendant testified that he never had any business transactions with the plaintiff; that his wife had a separate income from which for about ten years she had paid for her clothing; that she had traded with plaintiff for three or four years, paying her bills with her own checks, but that he

[4] Accord, as to services of an attorney in a separation suit. Naumer v. Gray, 28 App. Div. 529, 51 N. Y. S. 222 (1898); Id., 41 App. Div. 361, 58 N. Y. S. 476 (1899); Horn v. Schmalzholz, 150 App. Div. 333, 134 N. Y. S. 652 (1912). A husband is not liable to his wife's attorney for his services in a suit for an absolute divorce. See 25 A. L. R. 354, for authorities. But see pp. 719 to 723, infra, that a wife may, in a divorce suit, secure an allowance of counsel fees to be paid by her husband.

The husband is generally held liable for the wife's funeral expenses. See Barnes v. Starr, 144 Md. 218, 124 A. 922, 34 A. L. R. 809 (1923).

had paid for some clothing contracted for by his wife; that he paid substantially all the bills for the maintenance of his household except the clothing bills for his wife and daughters. The wife's previous purchases from the plaintiff had been paid for the wife with her own checks.

At the close of the evidence the plaintiff requested the judge to rule among other things, as follows: That the fact that the wife had a separate income—such fact being uncommunicated to the plaintiff—does not release the husband from his liability to pay for goods suitable to the wife's station in life, supplied by the plaintiff to the wife while husband and wife were living together.

With respect to this request the judge ruled that the noncommunication to the plaintiff of the fact that the wife had a separate income was immaterial. The judge found for the defendant and the plaintiff excepted.

MORTON, J.[5] * * * It is not contended that the wife had express authority from the defendant to purchase the dress. The plaintiff relies on the obligation which a husband is under to furnish his wife with necessaries suitable to her station in life, and on the authority which she has by law, in case of his neglect to do so, to purchase them on his credit. The question is whether, under the circumstances of this case, the defendant is liable on that ground. A wife has not authority to purchase on her husband's credit such clothing as she deems suitable and proper. Generally speaking, it is only in cases of necessity that the law constitutes her his agent with authority to pledge his credit. This is the law in England, as well as here. Raynes v. Bennett, 114 Mass. 424; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Debenham v. Mellon, 6 App. Cas. 24; Jolly v. Rees, 15 C. B. (N. S.) 628. It is possible that the husband's consent to or acquiescence in the doing of certain things by the wife may constitute her his agent quoad such matters. Such an agency may be presumed, perhaps, under some circumstances, in regard to those things relating to the family, for instance, which it is usual for the wife to do, and which she does without any question or objection on the part of her husband. Debenham v. Mellon, ubi supra. This case, however, as already observed, stands on a different ground from either of those just referred to.

The plaintiff and his wife were living together, and he paid all of the expenses for the maintenance of the household, except those for the clothing of his wife and daughters. The bulk of those was paid by the wife out of her income. She had been accustomed for ten years to do this though the defendant had paid some bills for clothing contracted by her in his name. For aught that appears, her income was sufficient to clothe her suitably according to her station in life, and it fairly may be assumed that it was understood between them

[5] Statement abridged.

that it should be used by her in this manner. We do not see how, under such circumstances the defendant can be held liable. Assuming that the dress was suitable according to her station in life, it does not appear that the defendant had refused or neglected to provide his wife with suitable clothing, and consequently one of the essential grounds in which the law raises an agency in the wife's favor to bind the husband was wanting. Further, the judge who heard the case may have found that, although the dress was suitable, it was not necessary.

We do not mean to intimate that the fact that a wife has an income of her own relieves the husband from his obligation to support her, or absolves him from liability for suitable clothing bought by her in consequence of his refusal or neglect to provide it for her. It is not necessary to decide that question now. See Thorpe v. Shapleigh, 67 Me. 235; Liddlow v. Wilmot, 2 Stark. 86.

The rulings asked for assumed in one form or another that the defendant was liable. As we do not think that he is, it is unnecessary to consider them in detail. The modifications which the judge made in the fourth and sixth rulings asked for were rightly made.

Exceptions overruled.

ANTHONY, COWELL & CO. v. PHILLIPS.

Supreme Court of Rhode Island, 1890. 17 R. I. 188, 20 Atl. 933, 11 L. R. A. 182.

Defendant's petition for a new trial.

STINESS, J. The plaintiffs sold and delivered the furniture sued for to the defendant's wife upon her order, and charged the bill to the defendant. They had previously made similar sales upon her order, and the defendant had paid the bills without objection. Upon one occasion the defendant had accompanied his wife to the plaintiffs' store, when a bill of goods was purchased, but at other times she was alone. At the time of the last sale the defendant and his wife had separated, and these goods were sent to the house where the wife was living apart from her husband, having left him, so far as appears, without justifiable cause. The plaintiffs did not know of the separation. The defendant requested the court below to instruct the jury as follows: "If the husband provided a suitable home according to his means for his wife, and she voluntarily left the same, without fault on his part, he was not liable for debts contracted by her while living apart from her husband, by reason of his being her husband, even though he had paid for goods ordered by his wife and delivered at their home while living together, whether the persons dealing with her had notice of the separation or not."

The court instructed the jury that if a woman lives apart from her husband by her own wrong, the husband is discharged from sup-

porting her; but when a tradesman furnishes goods to a wife after separation, the husband having previously paid for goods furnished to her, the tradesman not knowing of the separation, and not having reasonable cause to know it, the agency may be presumed to continue until knowledge is brought home to the tradesman. Exception was taken to this instruction. We think the instruction as given was correct. A married woman may bind her husband for goods bought by her in two ways: For necessaries by reason of his obligation to support her when he omits or refuses to provide them under circumstances which make it his duty so to do; and for other things when she acts as his agent, under his authority, express or implied. In the former case she may bind him without, or even against, his personal authority, by what is termed her agency in law; in the latter case she can bind him only in the way that any person may bind another, by an agency in fact. The request made in this case related only to the marital obligation, and instruction was given substantially as requested. If the husband provided a suitable home for his wife which she voluntarily left, without fault on his part, it is clear that he would not be liable for goods furnished to her while away by reason of the fact of marriage. Debenham v. Mellon, L. R. 6 App. Cas. 24. The portion of the instruction excepted to covered the liability of the husband by reason of the agency of the wife.

The only question in this case, therefore, is, whether the plaintiffs might presume that the agency, evidenced by previous dealing, continued until they knew, or had reason to know, of the separation, or of a revocation of the agency. This question relates to the law of agency rather than to the relation of husband and wife. The liability of the husband in case of such agency was settled in the case of Manby v. Scott, 1 Sid. 109, 120, by the third resolution agreed to by the judges (2 Smith, Lead. Cas, Hare & Wallace notes, *418,) as follows: "III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his assumpsit in law, yet on his assumpsit in fact, whether the goods are for himself, or for his children, or for his family, all which positions are so obvious that they require no demonstration." If, then, the husband has held the wife out as his agent, by previous dealings, the person has the right to presume that the authority continues, until he has reason to know to the contrary. This is the well-established rule in cases of agency. See Story, Agency, § 470, and note; 1 Amer. & Eng. Encyclopædia of Law, 448, and cases cited. A familiar illustration of this rule is found in the case of a retiring partner. This was the substance of the instruction given to the jury, and it was therefore correct. Mickelberry v. Harvey, 58 Ind. 523; McGeorge v. Egan, 5 Bing. N. C. 196; Reid v. Teakle, 13 C. B. 627; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Cany v. Patton, 2 Ashm. (Pa.) 140.

Petition dismissed.

BOLTON v. PRENTICE.

Court of King's Bench, 1744. 2 Str. 1214.

In assumpsit for goods sold and delivered to the defendant's wife, the case appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's house, and the plaintiff furnished her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and suspecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trusting her again.

After this the defendant and his wife cohabited together for a year, when without any cause appearing he left her, locked up her clothes, and upon her finding him out, refused to admit her, and struck her, and declared he would not maintain her, or pay anybody that did. In this distress she borrowed clothes of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree; which the defendant refusing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held the verdict was right; for whilst they were at the plaintiff's, there was a particular reason for the particular prohibition; yet the causeless turning her away destitute afterwards, gave her the general credit again: and if a husband should be allowed, under the notion of a particular prohibition, to destroy her obtaining credit in one place, he may in the same manner prevent it with all people she is acquainted with. He appears to be a wrongdoer, and therefore has no right to prohibit anybody. They distinguished this case from the case of Manby v. Scott, 1 Sid. 109, for there the wife was guilty of the first wrong in eloping.[6]

MORGENROTH v. SPENCER.

Supreme Court of Wisconsin, 1905. 124 Wis. 564, 102 N. W. 1086.

[Action to recover for professional services performed by the plaintiff, a physician, for the wife of the defendant. The action was tried by the court and a jury and a verdict was directed for the plaintiff. The defendant appeals.]

KERWIN, J. * * *

[6] If the husband turns the wife out, he cannot dictate where she shall live. "She may go where she pleases, so long as the place selected by her is respectable and the expense thereof does not exceed proper limits, taking into consideration the financial circumstances of the husband." Kirk v. Chinstrand, 85 Minn. 108, 88 N. W. 422, 56 L. R. A. 333 (1901). Nor can he exercise the same degree of control over the amount and kind of her expenditures for necessaries, which he can when they are living together. Pattberg v. Pattberg, 94 N. J. Eq. 715, 120 A. 790 (1923).

While there is evidence on the part of the plaintiff tending to show that the wife was living apart from the defendant with his consent and that he assented to the employment of plaintiff, yet it is not sufficient to justify the court in taking the case from the jury. From a careful examination we find there is ample evidence to support a finding to the effect that the wife of defendant was living separate and apart from her husband without his consent, and without cause, at the time the services were performed.

Plaintiff contends that the medicines and services furnished were necessaries which defendant was bound to provide, and it is doubtless upon this theory that the court below directed a verdict for plaintiff. When the defendant's wife deserted him without cause, and continued to live apart from him without his consent, she did not take with her the defendant's credit. Her misconduct deprived her of power to bind her husband, and it was incumbent upon plaintiff to prove her authority, in order to make out a case against defendant. Schouler, Dom. Rel. § 69. Prima facie, a woman living separate and apart from her husband has no power to bind him, and it is incumbent upon the person furnishing necessaries to a wife so living apart from her husband to show that she is so living for justifiable cause. Inhabitants of Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669. In the case at bar, if the wife of defendant was living separate and apart from him without cause and without his consent, and he did not authorize the employment of plaintiff, plaintiff cannot recover. Sturtevant v. Starin, 19 Wis. 268; Brown v. Worden, 39 Wis. 432. Upon the facts proved, it was a question for the jury to determine whether a rupture had taken place between husband and wife, of such a nature as to deprive her of authority to pledge his credit for necessaries supplied. Crocker v. Napper, 16 Law T. 295; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373. * * *

It follows that the court erred in directing a verdict for the plaintiff.[7]

[7] Accord: Steinfield v. Girrard, 103 Me. 151, 68 A. 630 (1907); Vusler v. Cox, 53 N. J. Law, 516, 22 A. 347 (1891). See, also, State v. Lancaster, 135 S. C. 412, 133 S. E. 824 (1926).

If the wife's desertion and subsequent adultery are due to her insanity, the husband is liable for her necessaries. Audrain County v. Muir, 297 Mo. 499, 249 S. W. 383 (1923).

But if the parties are living separate, even by consent, there is no presumption of an agency in fact, and, if there are not prior dealings creating an agency by estoppel, the plaintiff has the burden of proving that the supplies were necessaries. Annis v. Manthey, 234 Mich. 347, 208 N. W. 453 (1926). See Vusler v. Cox, supra.

OTT v. HENTALL.

Supreme Court of New Hampshire, 1899. 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226.

Assumpsit. Facts found by the court. The defendant so treated his wife as seriously to injure her health, in consequence of which she left him. After this, the plaintiffs furnished her, at her request, medical attendance, nursing, and board, she pledging the defendant's credit for the same. Hutson made a bill against the wife, but was told by her that the defendant was obliged to pay it. The services, etc., were necessary for her recovery, and were adapted to her condition. Each of the plaintiffs knew that she was living apart from her husband. She had $700 or $800 on deposit in a savings bank. A feeble-minded son was partially dependent upon her for support. Judgments are to be rendered for the parties entitled to them upon the foregoing facts. * * *

CHASE, J. * * * There are authorities which hold that where necessaries are furnished a wife living apart from her husband without her fault, and she has funds of her own, the liability of the husband depends upon the question of fact whether her means are adequate to her support. Liddlow v. Wilmot, 2 Stark. 86; Dixon v. Hurrell, 8 Car. & P. 717. The defendant relies upon Hunt v. Hayes, 64 Vt. 89, 23 Atl. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917, and Litson v. Brown, 26 Ind. 489, in support of this proposition. [The court then reviewed these cases in detail and continued as follows:]

Concerning the reasons given for the decisions in these cases, it is sufficient to say that they seem to be inconsistent with the character of the obligation which the law imposes upon the husband as a part of the marriage relation. Marriage is founded on the idea that the parties will establish a home and rear a family. The husband is by nature, as well as by law, the leading and responsible party in the undertaking. Among other things, he takes upon himself the duty of providing a home and suitably maintaining the wife and children. The wife's ability to provide herself with the necessaries of life does not relieve him from the duty while they live together; and no good reason is perceived why it should do so while she is living apart from him in consequence of his misconduct. The duty is taken into consideration in awarding alimony to the wife in connection with or after a divorce. Morrison v. Morrison, 49 N. H. 69, 73; Janvrin v. Janvrin, 59 N. H. 23. If the wife does not desire a divorce, or the husband's misconduct has not continued a sufficient length of time to constitute a cause for divorce, the court, upon petition of the wife, "may make to her reasonable allowance out of the estate of the husband for the support of herself and children." Pub. St. c. 176, § 4. The fact that the wife has means of her own does not deprive her of the right to alimony in the one case, or to an allowance in the other. So far as

her right and the husband's correlative duty are concerned, the necessity for clothing her with authority to obtain necessaries upon the husband's credit exists when she has means the same as when she has none. This is the necessity upon which the law bases the husband's implied promise when he fails in the performance of his duty.

It follows from the foregoing considerations that the statutes of the state enabling married women to hold to their own use property acquired by them, and enlarging their rights and liabilities, do not affect this question. These statutes have not taken away the right of either party to the marital contract, to have the affection, society, and aid of the other. Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Seaver v. Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597. While the wife is at liberty to provide herself, her husband, or her children with the necessaries of life, at her own expense or upon her own credit, the duty of supplying them rests by law upon the husband. Parsons v. McLane, 64 N. H. 478, 479, 13 Atl. 588. The circumstances disclosed in this case were such that the defendant's wife had authority to pledge his credit for the necessaries which she obtained from the plaintiffs. Whether she did so was a question of fact which has been determined in the plaintiffs' favor. Hutson's bill against the wife was not conclusive evidence upon the question. Walker v. Richards, 41 N. H. 388. The plaintiffs are entitled to judgments. * * *[8]

EASTLAND v. BURCHELL.

High Court of Justice, 1878. L. R. 3 Q. B. Div. 432.

LUSH, J. The questions arising in this appeal are: 1st, whether the defendant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October, 1877, under the circumstances stated in the case; and, 2ndly, whether the county court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the defendant was; the ground of rejection being, that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The defendant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the defendant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed, by which she was to take

[8] Contra: Hunt v. Hayes, 64 Vt. 89, 23 A. 920, 15 L. R. A. 661, 33 Am. St. Rep. 917 (1891), where the wife had an annuity sufficient for her support, paid her by her husband under an antenuptial agreement. See 18 A. L. R. 1131.

and enjoy all articles of personal ornament and dress, and all property and income to which she then was, or should thereafter become possessed or entitled, and the savings of all income. The defendant covenanted to pay to the trustee £5. a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the £5. per quarter, and not apply to the defendant for any further pecuniary assistance, and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the defendant had paid the £5. per quarter up to a period subsequent to the accruing of the debt in question.

The plaintiff had never known the defendant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods supposing her to be a married woman, but without making any inquiries in the matter. The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation, in receipt of her separate income, which brought in £297. 15s. 2d. per annum, and the £20. a year paid by the defendant; and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not

apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express term of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is the stipulated allowance. He can derive no authority from the wife, which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to shew that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him.

We need only refer to the two more recent cases of Johnston v. Sumner, 3 H. & N. 261, 27 L. J. (Ex.) 341, and Biffin v. Bignell, 7 H. & N. 877, 31 L. J. (Ex.) 189.

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the defendant is not liable for the debt contracted with the plaintiff.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial.

We therefore act upon the wholesome provision of the Judicature Act, 1875, Order XL., Rule 10, and direct that the judgment for the plaintiff below, be set aside, and judgment be entered for the defendant.

Judgment for the defendant.[9]

[9] But see Lyons v. Schanbacher, 316 Ill. 569, 147 N. E. 440 (1925), to the effect that an agreement relieving the husband of his duty to support the wife is invalid as in violation of his legal duty. See, also, Van Koten v. Van Koten, 323 Ill. 323, 154 N. E. 146, 50 A. L. R. 347 (1926). But cf. the rules relating to agreements for separate maintenance, pp. 728 to 734, infra.

In Ryan v. Dockery, 134 Wis. 431, 114 N. W. 820, 15 L. R. A. (N. S.) 491, 126

WICKSTROM v. PECK.

Supreme Court, Appellate Division, First Department, 1917. 179 App. Div. 855, 167 N. Y. S. 408.

Appeal from Trial Term, New York County.

Action by Augusta Wickstrom against Samuel W. Peck. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed, and new trial ordered.

See, also, 155 App. Div. 523, 140 N. Y. S. 570, and 163 App. Div. 608, 148 N. Y. S. 596.

Argued before CLARKE, P. J., and SCOTT, SMITH, DAVIS, and SHEARN, JJ.

SHEARN, J. This is an action at law brought by a tradeswoman against a married man for alleged necessaries furnished to the wife during coverture. The defense was in part (1) that the merchandise was sold to the defendant's wife exclusively upon her credit; and (2) that the defendant had furnished his wife with an allowance sufficient to pay for all necessaries.

The defendant contends that the court in effect charged the jury that the defendant was liable, if the articles sold were necessaries, irrespective of whether they were sold exclusively on the credit of the wife and that this was manifest error. Let us see first whether the court did lay down such a rule. The court said:

"Whether or not the credit was given exclusively to the wife is not to be determined as a question of law, but is to be submitted as a question of fact to the jury here. I so charge you."

Obviously that laid down no rule for the guidance of the jury, for no instruction was contained in that statement, or given in connection with it, as to the effect of the jury's finding that credit was given exclusively to the wife. This was followed by the direct charge:

"If they were necessaries, within the legal acceptation of that term, then the husband was liable to whomsoever furnished such necessaries to the wife, no matter to whom the credit was originally extended."

No other instruction on the question of credit was given until the defendant's counsel pressed upon the court requests to charge. The court was asked to charge:

"That the burden of proof is upon the plaintiff to prove that she gave credit to the defendant for the goods in question."

This was refused. The defendant excepted. This request, it will be observed, had to do with the burden of proof, and conveyed no further instruction to the jury as to the effect of any finding it might make on the question of extension of credit. The defendant's counsel then requested the court to charge:

Am. St. Rep. 1025 (1908), it was held that a wife's promise to devise all her property to her husband in consideration of his caring for and supporting her was void, as being without consideration.

"That if the plaintiff gave credit for the goods to the defendant's former wife, Josephine, that then plaintiff's recourse is against her alone."

The court refused so to charge, and said:

"The Appellate Division has passed upon that, and has held that it does not make any difference, if the goods were necessaries."

Assuming that the request was too broad, in that it failed to take into consideration that credit might have been extended to both husband and wife, because of counsel's failure to use the word "solely" or "exclusively," there can be no fair question but that, from the foregoing, the jury was given to understand very distinctly that, if the goods were necessaries, the defendant was liable, irrespective of the person to whom credit was extended. The court refused to charge defendant's eighth request:

"Where credit is given solely to the wife upon a sale to her, the husband is not liable, although they live together and he sees her in possession of the goods thus bought."

This squarely raised the defendant's point, and as the jury was instructed, in the last words they heard upon the subject, that it made no difference to whom credit was furnished, if the goods were necessaries, the defendant is in a position to urge the alleged error in the court's charge.

This brings us to the second and real question in the case—whether in an action at law a married man can be held liable to a tradesman for necessaries furnished the wife, irrespective of whether credit was extended to her exclusively or not. There can be no doubt, as it seems to me, that such question must be answered in the negative, both upon reason and upon an unbroken line of authorities. The theory of permitting the tradesman to allege that the contract was the husband's, and the sale made to the husband is the implied agency of the wife growing out of the marital relation, which relation imposes upon the husband the legal duty to furnish his wife with necessaries. This squarely appears to be the law as laid down in the leading case of Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621, quoting with approval the leading English case of Debenham v. Mellon, L. R. 5 Q. B. Div. 394. See, also, Schouler's Domestic Relations, § 61:

"On the important principle of the wife's agency rests the liability of the husband, at common law, in contracts made by the wife for necessaries."

Now, then, it must be perfectly clear that a tradesman who supplies goods to a wife exclusively upon her credit deals with her as a principal and not as an agent. In the latter case the contract is with the husband; in the former, it is with the wife, who has the same right to contract with third persons on her own individual responsibility as has an unmarried woman. No one would seriously claim, if a person interested in the welfare of the wife of another bought necessaries of

life for her, that the tradesman could hold the husband in an action at law. Whoever deals as a principal is liable as such, and where one contracts as principal no question can arise as to the liability of another on the theory of agency. The authorities are all to this effect. In Griffin v. Banks, 37 N. Y. 621, 623, the Court of Appeals said:

"The rule is that, where credit is given solely to the wife, upon a sale to her, the husband is not liable, although they live together and he sees her in possession of the goods thus bought."

No cases to the contrary are cited. As far back as 1811 it was so held by Lord Ellenborough in Metcalfe v. Shaw, 3 Campbell, 22. So in Bentley v. Griffin, 5 Taunton, 356:

"It is a question of fact whether a tradesman who furnishes goods to a wife gives credit to her or her husband; if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods." (Syllabus.)

Coming down to our own times, in Kenny v. Meislahn, 69 App. Div. 572, 75 N. Y. S. 81 (Second Department), the court, in concluding an opinion affirming a judgment against the husband, after reviewing the evidence, said:

"It fairly establishes the fact that the support was not furnished upon the credit of the wife, but was solely because of the defendant's default, and was supplied under circumstances which made him chargeable."

The inference would seem clear that, if the support was furnished upon the wife's credit exclusively, the husband would not be chargeable. Upon the first appeal in this case (155 App. Div. 523, 140 N. Y. S. 570) Judge McLaughlin said:

"If evidence be introduced showing that they were necessaries, then defendant is liable to pay for them (De Brauwere v. De Brauwere, 203 N. Y. 460 [96 N. E. 722, 38 L. R. A. (N. S.) 508]), unless he can show that the wife was supplied with articles of the same character as those purchased, or that he had given her sufficient money to pay cash for them, or notice, if the purchases were made, they were on her credit and not his."

Here is clearly recognized a case where, the articles being necessaries, if the sales were made on the wife's credit, the husband is not liable. True, the statement of the supposititious case included a notice by the husband. But, if a husband can escape liability by giving the notice, it is only because the reception of the notice by the tradesman, and his supplying goods thereafter destroys any possible claim of implied agency. This is only another way of saying that, if the credit is given exclusively to the wife, as it must be in a case where a notice has been served, the tradesman cannot hold the husband in an action at law.

On the second appeal in this case (163 App. Div. 608, 148 N. Y. S. 596) the court was dealing with a dismissal of the complaint upon the

ground that it appeared that the plaintiff had given credit exclusively to the wife. The court said:

"We do not think that upon this evidence the court should have held, as matter of law, that the credit was given exclusively to the wife. Whether it was or not was a question of fact, which should have been submitted to the jury."

This was, of course, a clear recognition of the rule that, where the credit is given exclusively to the wife, the husband is not liable at law. If this were not so, there would be no sense in submitting to the jury the question of credit. If the rule were that the husband is liable in an action at law on the mere showing that the articles were necessaries, the question of credit could not possibly arise. The Second Department took the same view in Wilder v. Brokaw, 141 App. Div. 811, 126 N. Y. S. 932, the Presiding Justice saying:

"This case presents an account for the lodging and the food for two women, for substantially the same period, which must be justified on the theory that the husband of one of them perforce of that relationship was bound under the circumstances to furnish as a necessary to his wife this maintenance of her sister, and that his wife as his agent ex necessitate could contract therefor. * * * I think that the learned court should have submitted the question as to whom credit was given to the jury. * * * The theory of the action is that Mrs. Brokaw was constituted by law the agent of her husband, for the plaintiff alleges that the liability was incurred at the husband's instance and request. * * * But the question then before the court was not whether the wife should be held personally, but whether the merchant intended to extend credit to her personally, or whether he in effect made the contract with her as the agent of her husband. Arnold v. Allen, 9 Daly, 198. * * * However strong or weak, here are facts which are relative to the question to whom credit was extended. Debenham v. Mellon, L. R. 6 App. Cas. 33, 34. * * * Wherefore I think that the learned court erred in refusing the submission of this question to the jury."

Schouler, an authority on Domestic Relations, says in his text-book (section 64):

"The presumption of an agency on her husband's behalf may be overcome by the fact of a purchase by the wife upon her own or some third person's credit, wherever she is really trusted as principal herself, or as the agent of some one else than her spouse, or where the third person ordered them in person."

As recently as Werner v. Werner, 169 App. Div. 9, 17, 154 N. Y. S. 570, 576, this court, Clarke, P. J., writing, referred with approval to the English cases, holding that:

"The question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation."

There can be no doubt, therefore, that both in reason and authority

the husband is not liable in an action at law, where it is established that the credit was extended solely to the wife. * * *

Judgment and order reversed, and a new trial ordered, with costs to appellant to abide the event. Order filed.[10]

CLARKE, P. J., and SMITH and DAVIS, JJ., concur. SCOTT, J., concurs on second ground.

FEINER v. BOYNTON.

Supreme Court of New Jersey, 1905. 73 N. J. Law, 136, 62 Atl. 420.

GARRETSON, J. The plaintiffs recovered a judgment against the defendant in a District Court for the value of goods furnished. The defendant is, and at the time the goods were furnished was, a married woman living with her husband.

The goods furnished were for the personal use of the defendant.

It appears from the state of the case that the husband provided the defendant with money from time to time for her household and personal expenses; that the account with the plaintiffs had always been in the defendant's name; that the defendant paid the bills, of which there were a large number, during the 11 years through which the account had been running, with her own checks, drawn upon a bank where her husband had deposited money for her, of which deposit the plaintiffs had no knowledge at all; that the plaintiffs had never had any dealings with her husband; that the husband deposited various sums of money, ranging from $300 to $700, in the People's Bank of East Orange, and that the defendant drew her own checks against said accounts to pay for the various household expenses, as well as for her clothing; that she had a separate estate.

There is no evidence to show that the defendant ever made any express contract with the plaintiffs which would bind her separate estate, and the only evidence from which a contract could be inferred was that the goods were charged to the defendant on the plaintiffs' books and that the defendant paid the bills with her own checks, but there is nothing to show that the defendant knew that the goods were being charged to her by the plaintiffs, and the checks she gave in payment were of her husband's moneys, which had been deposited by her husband to pay for household expenses and her clothing.

A debt incurred for the necessary clothing of a married woman is presumably the debt of the husband, and if incurred by the wife it is presumed she is acting as the agent of her husband unless there is affirmative evidence to show that she intended to charge her separate estate.

[10] Accord: Gafford v. Dunham, 111 Ala. 551, 20 So. 346 (1895), even though under the law of that state at that time the wife's promise to pay was void. Contra: Edminston v. Smith, 13 Idaho, 645, 92 P. 842, 14 L. R. A. (N. S.) 871, 121 Am. St. Rep. 294 (1907); McKee v. Popular Dry Goods Co. (Tex. Civ. App.) 240 S. W. 567 (1922). See 27 A. L. R. 554, for a note on this subject.

In Wilson v. Herbert, 41 N. J. Law (12 Vroom) 454, 461, 32 Am. Rep. 243, it is held: "When husband and wife are living together, and the wife purchases articles for domestic use, the law imputes to her the character of an agent of her husband and regards him as the principal debtor. She may contract for such articles as principal and assume the responsibility of a principal debtor. But to fix upon her a liability, it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment exclusive of the liability of her husband."

The judgment of the District Court is reversed.[11]

KENYON v. FARRIS.

Supreme Court of Errors of Connecticut, 1880. 47 Conn. 510, 36 Am. Rep. 86.

[Bill in equity to recover money advanced to the wife of the respondent for the purchase of necessaries by her while deserted by her husband. The respondent demurred and the demurrer was sustained and the petition dismissed. The petitioner brought the record before this court by a motion in error.]

PARDEE, J. This is a bill in equity. The petitioner alleges that on or about the first day of March, 1876, the respondent wilfully deserted his wife, she being without fault; that thereafter he neglected and refused to furnish means necessary for her support; that she was without means of support and was in need of the necessaries of life; that at her request during the time of such need the wife of the petitioner advanced from her separate estate from time to time sums of money aggregating $800 to the respondent's wife for the purpose of enabling her to procure the necessaries of life; and that she expended the money in the purchase for herself of such necessaries as her husband was legally bound to furnish. And the petitioner alleges that he brings this bill as trustee for his wife; and that he is without adequate remedy at law. He prays to be subrogated to the rights of the several persons who sold these necessaries to the respondent's wife; and that the respondent be ordered to pay said amount to him as such trustee; or that relief should be granted in some other manner.

The following cases are precedents for this bill:

In Harris v. Lee, 1 P. Wms. 482, the petitioner had loaned £30. to the respondent's wife who had left him for cause, to enable her to pay doctors and for necessaries. The court said:—"Admitting that the wife cannot at law borrow money, though for necessaries, so as

11 Accord: Mettler v. Snow, 90 Conn. 690, 98 A. 322, Ann. Cas. 1917C, 578 (1916); Clark v. Tenneson, 146 Wis. 65, 130 N. W. 895, 33 L. R. A. (N. S.) 426, Ann. Cas. 1913C, 141 (1911).

to bind the husband, yet this money being applied to the use of the wife for her use and for necessaries, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons could be creditors of the husband, so the plaintiff shall in their place and be a creditor also; and let the trustees pay him his money and likewise his costs." And in Marlow v. Pitfield, 1 P. Wms. 559, the court said:—"If one lends money to an infant to pay a debt for necessaries and in consequence thereof the infant does pay the debt, here although he may not be liable at law, he must nevertheless be so in equity."

In Dean v. Soutten, 9 L. R. Equity Cases, 151 (1869), the marginal note is as follows:—"A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband." In giving the decision Lord Romilly, M. R., said:—"I am of the opinion that this is a proper suit and that the plaintiff is entitled to a decree. The cases cited on behalf of the defendant have no application, and May v. Shey, 16 Sim. 588, is overruled by Jenner v. Morris, supra."

Jenner v. Morris, 3 De G., F. & Jones, 45, was a bill to compel the payment of money advanced to a deserted wife. In giving the opinion the Lord Chancellor said:—"An action at law could not be maintained for such a claim. Those who supply the necessaries to the deserted wife may sue the husband at law, she being considered his agent with uncountermandable authority to order the necessaries on his credit. But courts at law will not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessaries or pays the trades-people who have furnished them. Nevertheless, it has been laid down from ancient times that a court of equity will allow the party who has advanced the money which is proved to have been actually employed in paying for necessaries furnished to the deserted wife, to stand in the shoes of the trades-people who furnished the necessaries, and to have a remedy for the amount against the husband. I do not find any technical reason for this; but it may be possible that equity considers that the trades-people have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries, and that although a chose in action cannot be assigned at law, a court of equity recognizes the right of an assignee. Whatever may be the reason, the doctrine is explicitly laid down in Harris v. Lee, 1 P. Wms. 482, and the other cases referred to. Objection has been made to these authorities that they are very old, and that they do not appear to have been acted upon in modern times. But it may be said, on the other hand, that they have been acted upon without ever having been questioned, and that they are entitled to more respect from their antiquity. I find that they are cited and treated as good

law by subsequent text writers on this subject. Considering that to establish the equitable liability of the husband, proof is required that the money has been actually applied to the payment of the debt for which the husband would be liable at law, no hardship or inconvenience can arise from adhering to this doctrine.

In Walker v. Simpson, 7 Watts & Serg. (Pa.) 83, 42 Am. Dec. 216, the court said:—"Although the husband is to blame for having caused the separation, yet he is only chargeable at law for the necessaries supplied to his wife at her request, and not with money lent or advanced to her, because money cannot be considered necessaries, which consist of food, lodging, and raiment. But where the money lent or advanced has been applied to the payment of necessaries furnished to her, equity will put the party lending or advancing the money in the place of the party who supplied the necessaries."

We willingly follow the leading of these authorities, because we think that the line of separation between necessaries and money loaned for the purpose of purchasing them may well be obliterated. So far as the husband is concerned they are practically convertible terms. His burthen will not be increased if he is made liable for the money; the scope of the word necessaries will not thereby be broadened; the lender will be compelled to prove an actual expenditure for them; the law has discharged its duty to the husband in protecting him from liability for anything beyond them; it only discharges its duty to the wife by making it impossible for him to escape liability for these irrespective of the method by which he forces her to obtain them. If he has any preference as to that method the law will secure it to him; if he refuses to adopt any, he is not to be heard to complain if she is permitted to elect, providing always that she is kept within the small circle of necessity. It is not certain that credit will, under all circumstances, supply necessaries to the wife; at times they may not be had without money, and accidents of time, place or distance may bring about such a state of things as that a friend may be able and willing to place money in her hands upon her husband's credit, who cannot personally attend to its disbursement.

There is error in the judgment complained of.

In this opinion the other judges concurred; except Carpenter, J., who having tried the case in the court below did not sit.

DE BRAUWERE v. DE BRAUWERE.

Court of Appeals of New York, 1911. 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508.

Action by Alice De Brauwere against Louis De Brauwere. From an order of the Appellate Division (144 App. Div. 521, 129 N. Y. S. 587), affirming an interlocutory judgment overruling a demurrer to the amended complaint at Special Term (69 Misc. Rep. 472, 126 N. Y. S.

221), defendant appealed by permission (130 N. Y. S. 1109). Affirmed.

The order granting leave to appeal to this court certifies the following question: "Does the complaint state facts sufficient to constitute a cause of action?" The nature of the action and the facts, so far as material, are stated in the opinion.

WILLARD BARTLETT, J. In this case the plaintiff, a married woman, who has been abandoned by her husband, sues the husband to recover moneys which she has been compelled to expend out of her separate estate to provide necessaries for herself and her three infant children. Her separate estate consisted of the proceeds of her own labor as a seamstress and janitress and in part of a small sum of money received by way of inheritance from a deceased relative. Since he abandoned his family about September 1, 1904, the defendant has contributed nothing toward their support except the sum of $50, and although the plaintiff has endeavored to procure necessaries for herself and her children upon his credit she has been unable to do so. About the time when the husband left his family, the wife caused him to be arrested on a charge of abandonment, and he was ordered to pay her $6 a week; but he refused to comply with this order, and removed from the state of New York into the state of New Jersey where he resided at the time of the commencement of this action. The defendant demurred to a complaint setting forth the facts substantially as they have been stated. His demurrer was overruled at the Special Term, and an interlocutory judgment was rendered in favor of the plaintiff, which has been affirmed by the Appellate Division. The questions presented by the demurrer were elaborately discussed in both courts, and although both arrived at the same result they reached their conclusions upon somewhat different grounds. "A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." Van Valkinburgh v. Watson, 13 Johns. 480, 7 Am. Dec. 395. This rule has long been recognized as the law both in England and this country. A corollary of the rule is the proposition that, where a person has advanced money to a wife deserted by her husband for the purchase of necessaries and the money has been so applied, he can maintain a suit in equity against the husband for the money so advanced. The leading case to that effect in this country is Kenyon v. Farris, 47 Conn. 510, 36 Am. Rep. 86, in which the earlier English decisions are reviewed. The doctrine of that case has found general acceptance, except in Massachusetts, where it has been expressly rejected. Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673, 38 Am. St. Rep. 447. It has been followed without question by the Supreme Court in this state. Wells v. Lachenmeyer, 2 How. Prac. (N. S.) 252; Kenny v. Meislahn, 69 App. Div. 572, 75 N. Y. S. 81.

We may assume, then, that a husband is liable in equity to one who furnishes necessaries requisite for the support of his deserted wife and infant children, or to one who furnishes the wife with money with which to procure such necessaries. In the present case, however, the money used for procuring the necessaries was chiefly the outcome of the wife's own labors, and the question is whether she can maintain an action against the husband to recover it. Clearly no such action was maintainable at common law. At common law the personal property of the wife and all her earnings belonged to the husband. In this state, however, her marital disabilities have been wholly removed by statute, and the law now presumes that a married woman is alone entitled to any wages, earnings, or any other remuneration for services which she renders. Such compensation constitutes a part of her separate estate, and she can maintain any action in reference thereto which she could maintain if she were unmarried.

The learned judge who tried the case at Special Term was inclined to think that the plaintiff's right to recover should be sustained upon the doctrine of subrogation; the wife being subrogated to the rights of the persons who furnished the necessaries for herself and the children and whom she has paid therefor. We prefer to place his liability on a different ground. The husband was unquestionably under a legal obligation to provide his wife and children with the necessaries of life suitable to their condition. This liability would have been enforceable by the wife in her own behalf and in behalf of her infant children, were it not for her disability at common law to sue her husband. That disability having been removed, a wife who has applied her separate estate to the purpose of an obligation resting primarily upon her husband may now recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation. In other words, under the common law such a claim as that in suit was not enforceable, because a married woman was incapable of owning any separate estate and likewise incapable of maintaining an action at law against her husband. These obstacles have been removed by placing a married woman on the same footing with a woman who is unmarried in respect to her property rights, and by permitting her to enforce such rights in the courts against her husband no less than against strangers. The plainest principles of justice require that a wife should have some adequate legal redress upon such a state of facts as that set forth in this complaint, and the beneficial character of our legislation removing the former disabilities of married women could not be evidenced more forcibly than it is in its application to the present case.

The obligation of the husband to provide his wife and children with the necessaries of life suitable to their condition is to be measured with reference to his pecuniary ability, honestly exercised, or his pecuniary resources; that is to say, those things might properly be deemed necessaries in the family of a man of generous income or ample fortune

which would not be required in the family of a man whose earnings were small and who had saved nothing. The husband is bound to provide for his wife and children "whatever is necessary for their suitable clothing and maintenance, according to *his* and their situation and condition in life." Keller v. Phillips, 39 N. Y. 351, 354. The husband's pecuniary ability, therefore, may be an element to be considered upon the trial of the action, if any question is raised as to the character of the expenditures for which the wife seeks reimbursement.

The order appealed from should be affirmed, with costs, and the question certified answered in the affirmative.[12]

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

Order affirmed.

HYMAN v. HARDING.

Supreme Court of Illinois, 1896. 162 Ill. 357, 44 N. E. 754.

CARTWRIGHT, J. In November, 1888, Adelaide Harding, wife of defendant in error, purchased a ring of plaintiffs in error, and suit was brought against both husband and wife for the purchase money. Plaintiffs' declaration consisted of the common counts in assumpsit, and a special count under the statute making both husband and wife chargeable with family expenses. On the trial the common counts were withdrawn from the consideration of the jury. On the claim under the statute the verdict of the jury was against both defendants, and judgment was entered accordingly. Defendant in error alone appealed, and the judgment was reversed, without remanding, by the Appellate Court, which found as a matter of fact, and entered in its judgment, that the purchase price of the ring was $575, that it was a ruby and diamond ring, and that it was purchased without authority from her husband. A certificate of importance having been granted, the cause was brought to this court.

On the trial Adelaide Harding, co-defendant with her husband, was permitted to testify, against his objection, and she testified that the diamond setting was lost from her wedding ring, which originally cost $65, and that she had the ring re-set with diamonds and a ruby costing

[12] In Wickstrom v. Peck, 179 App. Div. 855, 167 N. Y. S. 408 (1917), supra, p. 467, in a portion of the opinion not printed herein, the court said that the doctrine of the De Brauwere Case, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508 (1911), would not permit the tradesman to recover from the husband, where he extended credit to the wife.

A wife, even after divorce, cannot sue her husband for damages for neglect to support her. Decker v. Kedly, 148 F. 681, 79 C. C. A. 305 (1906).

Many states have statutes making a husband liable criminally for failure to support his wife.

The right of a wife to secure a decree against her husband for support, with or without divorce, is treated in part 4 of this book.

$575, and it is insisted that the preservation of the wedding ring is a different class of expense from the purchase of an ordinary ring. But this testimony was incompetent, and erroneously admitted. The court said that it was admitted only to bind her, but the action was a joint one, against the husband and wife, and there could be no verdict against one without the other. Whatever would tend to establish the claim and conduce to a verdict against her would affect him in like manner. There was no competent evidence that any part of the ring sued for had ever been a part of a wedding ring, and it must be treated as any other ring—for mere personal gratification and adornment.

Section 15 of chapter 68 of Hurd's Statutes is as follows: "The expenses of the family and of the education of the children shall be chargeable upon the property of both the husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." [13] Under the findings of fact by the Appellate Court, the inquiry in this court is whether a ring is a family expense. The statute has been construed in Iowa, from which State it was taken, and elsewhere, to embrace merely legitimate expenses of the family, as such, incurred for articles to be used in the family, and actually used or kept for use therein. Fitzgerald v. McCarty, 55 Iowa, 705, 8 N. W. 646. The term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual as well as for the family. It does not include business expenses, which are incurred merely to secure the means to maintain the family, nor private or individual expenses, which do not affect the collective body of persons under one head constituting a household or family. But it does include expenses for many articles used by individual members of the family, if they mutually affect the members generally. It is apparent that even though an article is purchased for and used by only one member of the family, yet it is a family expense if it conduces in any substantial manner to the welfare of the family generally. Musical instruments may be as pleasant and beneficial to the other members of the family as to the operator. Books, pictures and articles of ornament used to adorn and beautify the home, though owned by individual members of the family, are beneficial to the family generally, and tend to maintain its integrity. Articles of clothing, though purchased for and used exclusively by individual members, are family expenses, as they contribute, in a substantial manner, by preserving health and otherwise, to the general well-being of all the members. It is equally apparent that an article is not a family expense if it in no way conduces to the welfare of the family generally, even though at times it is used or displayed, by the one for whom it was purchased, in the family. We think that a ring falls within this class. It is for personal adornment, largely to gratify vanity, and, though it may be incidentally worn in the family, its primary and important use is for display in general society.

[13] A number of states have such statutes. See 15 A. L. R. 856.

The case of Marquardt v. Flaugher, 60 Iowa, 148, 14 N. W. 214, is cited by plaintiffs in error; but in that case, which involved a watch and chain, a ring, and some other jewelry, neither the lower court nor the Supreme Court held that the ring was a family expense. The judgment in the lower court was of such an amount that it is a warrantable inference that it did not include the ring, while the Supreme Court impliedly, if not directly, stated that the ring was not a family expense. As to the watch and chain, it may be said that a watch is, primarily at least, for use, and in the family as much as elsewhere. It is usually beneficial to the family, as such, though worn only by one, while a chain may be, in prudence, a proper adjunct to a watch.

It is insisted the cause should have been remanded by the Appellate Court, to enable plaintiffs to try the cause on the common counts; but as the common counts were withdrawn on the trial, the only question related to the liability for expenses of the family and this, we think, the Appellate Court properly determined, and its judgment will be affirmed.

Judgment affirmed.

NEASHAM v. McNAIR.

Supreme Court of Iowa, 1897. 103 Iowa, 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202.

The petition alleges that the defendants are husband and wife, a family of large fortune, high social rank, and luxurious habits; that O. E. McNair purchased an article of jewelry for his personal use and adornment, and used the same for such purpose; that he afterward executed a note therefor, no part of which has been paid. It was admitted that the article referred to is a diamond shirt stud. Anna I. McNair demurred on the ground that such stud is not an expense for the payment of which she is liable. The plaintiff elected to stand on the ruling by which the demurrer was sustained, and appeals from the judgment dismissing the petition. Reversed.

LADD, J. Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense of the family, for which the wife may be liable? Section 2214 of the Code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law the husband was liable for any expense incurred in the clothing and maintenance of the wife and children suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. The wife, however, was not chargeable for

necessaries, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessaries, and affords an adequate remedy against both husband and wife. Smedley v. Felt, 41 Iowa, 588; Schrader v. Hoover, 80 Iowa, 243, 45 N. W. 734; Blachley v. Laba, 63 Iowa, 22, 18 N. W. 658, 50 Am. Rep. 724; Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515. The expense, however, is limited to that of the family, and must have been incurred for something used therein, or kept for use of or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646; Smedley v. Felt, supra. In the latter case a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home, under one head or manager. Menefee v. Chesley, 98 Iowa, 55, 66 N. W. 1039, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense. Clothing seems to have been treated as such. Finn v. Rose, 12 Iowa, 565; Devendorf v. Emerson, supra; Smedley v. Felt, supra. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table. Indeed, the services of a physician to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only. Schrader v. Hoover, supra; Marquardt v. Flaugher, 60 Iowa, 148, 14 N. W. 214. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. Brown v. Edmonds, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762; Stewart v. McClung, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374; Bumpus v. Maynard, 38 Barb. (N. Y.) 626. Contra, see Smith v. Rogers, 16 Ga. 480; Rothschild v. Boelter, 18 Minn. 361 (Gil. 331); Gooch v. Gooch, 33 Me. 535; Sawyer v. Sawyer, 28 Vt. 252. See 29 Am. & Eng. Enc. Law, 38. In Sawyer v. Sawyer, supra, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the Supreme Court of New Hampshire, adjudged a breastpin "not to be wearing apparel necessary for the debtor and his family." Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the person from exposure, and not articles of ornament merely. Originally it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves

the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person, there appears no good reason for not adjudging it a part of the wearing apparel; else much that is pleasing in dress must be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were often adjudged necessaries for which the husband was liable at common law. Raynes v. Bennett, 114 Mass. 424; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27. These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk hat. The article may be unnecessary, or such as the family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided. Dodd v. St. John, 22 Or. 250, 29 Pac. 618, 15 L. R. A. 717. If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank, and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no inconsiderable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actu-

ally used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor. Reversed.[14]

ROBINSON, J. (dissenting). I do not agree to what is said in support of the conclusion of the majority.

STRAIGHT v. McKAY.

Court of Appeals of Colorado, 1900. 15 Colo. App. 60, 60 Pac. 1106.

THOMSON, J. This suit was begun before a justice of the peace, and went to the county court by appeal. That court gave its judgment to the defendant, and the plaintiff has brought the judgment here for review. There were no written pleadings, and the nature and limits of the plaintiff's claim must be sought in the evidence.

On the 15th day of March, 1897, the plaintiff and J. H. McKay entered into a written contract, whereby the former leased to the latter a dwelling house and the household furniture which it contained, for the term of one year from the 1st day of April, 1897, at a monthly rental of $70.00; the lessee agreeing also to pay all assessments for water rent levied during the term of lease, as well as all charges for heating and lighting the premises, and, at the end of the term, to return the property in as good order and condition as it was in when he received it. The rent for April and May was paid. On the last day of May, the lessee and his family vacated the premises, and there was no further payment of rent. The plaintiff was unable to procure another tenant until the first day of the following September, when he leased the property for $60.00 per month. McKay did not pay the water rent, or the charges for lighting the premises, and the plaintiff paid a water bill of $18.00, and assumed a light bill of $8.65. During the occupancy of the premises under the lease, the furniture, carpets, and furnace were damaged to the amount of $90.00. The foregoing was all the evidence. This suit was brought against Beulah McKay, the wife of the lessee. Recovery was sought for $90.00, the damage to the furniture, etc., and $210, the rent for June, July and August, the months during which the premises were idle. In court, the plaintiff's claim, as stated by his agent, was specifically confined to those items, so that the water and light bills, and the reduction in rent to which the plaintiff was compelled to submit, when the premises were finally let, are not in the case.

It will be seen that the purpose of the action is the recovery of damages for breach of the contract of lease. The plaintiff bases his right to pursue the wife for those damages upon the following statutory

[14] The fee of an attorney who defended the husband on a felony charge is not a "family expense" under the Iowa statute (Code 1927, § 10459). Sager, Sweet & Edwards v. Risk, 190 Iowa, 207, 180 N. W. 299, 13 A. L. R. 1393 (1920).

MAD.D.R.

provision: "The expenses of the family and the education of the children, are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." Session Laws 1891, pp. 238, 239 (3 Mills' Ann. St. § 3021a). If we correctly understand the position of the plaintiff, it is that the defendant is bound by all the covenants and conditions of the contract of the lease, and that her liability for a breach of those covenants and conditions is coextensive with that of her husband. She was not a party to that contract; the covenants and agreements it contained were not hers, so that her liability, whatever it may be, is not a contract liability. A right of action is given against her for debts which she may have no hand in creating, but those debts must be clearly within the purview of the statute. Either husband or wife may incur indebtedness for the family expenses, and for such indebtedness either or both will be liable. But outside of the expenses of the family and the education of the children, neither can impose an obligation upon the other. Food and clothing are family expenses, and so are luxuries purchased for the use of the family. Such expenses are not confined to necessaries, but to be family expenses they must be for things received by the family, or some member of the family. The family requires a house in which to live, and the rent of the house occupied by it is part of the cost of living and is a family expense. But the rent of a house which the family does not occupy is not a family expense. So long as the defendant and her husband lived in the plaintiff's house, the rent agreed to be paid was a portion of the family expense, but when they left it, and went elsewhere, the rent chargeable against the husband by virtue of his contract, was not a family expense, because the family no longer had the benefit of the house. Damage done to furniture, which might be the subject of an action in tort, or which might be recovered against the husband by virtue of his contract, cannot be classed as a family expense. The husband is bound by the terms of the contract into which he entered, and he will be held to its performance, but the liability of the defendant is of statutory creation, and, as the statute is in derogation of the common law, she cannot be held beyond its letter. An indebtedness for something of which the family, or some one or more of its members, has had the actual benefit, she can be compelled to pay. It was incurred for family expenses. But an indebtedness for something of which neither the family, nor any of its members, has had the enjoyment, she cannot be compelled to pay, unless she contracted the debt herself. The statute does not cover such a debt.

A number of other states have statutes identical, or nearly identical, in terms, with ours, and those statutes have been the subject of considerable adjudication in those states. We have been referred to a voluminous list of decisions disposing of a great variety of questions arising under those statutes. To review each of those decisions would swell this opinion to undue dimensions. It is enough to say that we

have found nothing in disharmony with the views we have expressed, or that would authorize a recovery against the defendant upon the facts of which we are in possession.

The judgment will be affirmed.

Affirmed.[15]

BISSELL, P. J., not sitting.

HAGGARD v. HOLMES.

Supreme Court of Iowa, 1894. 90 Iowa, 308, 57 N. W. 871.

Action to recover the amount due on certain promissory notes given by defendant W. G. Holmes. His wife and codefendant Hannah Holmes, filed a demurrer to the petition, which was overruled, and then filed an answer, which contained two divisions. A demurrer of the plaintiff to the second division was overruled. He elected to stand on his demurrer and judgment was rendered in favor of Hannah Holmes for costs. The plaintiff appeals. Affirmed.

ROBINSON, J. The petition alleges that the defendant W. G. Holmes purchased an atlas or history of Muscatine county, Iowa, with pictures of himself and his wife inserted therein, and that he gave the notes in suit in settlement of the indebtedness incurred by his purchase; that the book was purchased for the benefit of the family of the defendants, and was used and kept for use by the family. In the second division of her answer, Mrs. Holmes alleges that, when the vendor of the book sought to sell it to her husband, she protested to the vendor against the purchase, and notified him that she did not want the atlas, and would not purchase or pay for it; that the vendor induced her husband to take the book, and give his notes for it, against her protest, well knowing that she had refused to sanction or consent to the purchase, with intent to cheat and defraud her, and to compel her to pay for the book from her separate property, under the pretense that the purchase was a family expense. The theory of the plaintiff's demurrer is that the husband, as the head of the family, had the right to incur a family expense, and thereby charge the separate property of the wife, although she objected to the purchase, and refused to consent to it. The pleadings do not show that the book was a family necessity. Something is claimed by the appellant from the ruling of the district court on Mrs. Holmes' demurrer to his petition, but the most that can be said for it is, that it held that the book was an item of family expense, because purchased for, and kept and used by, the family. It was not held, and the pleadings do not show, that it was a family necessity. We are, therefore, required to determine whether the husband may bind the property of the wife against her

[15] The plaintiff must prove that there is a "family"; i. e., that the spouses are living together. Gilman v. Matthews, 20 Colo. App. 170, 77 P. 366 (1904); Featherstone v. Chapin, 93 Ill. App. 223 (1900).

will, and notwithstanding her protest, in purchasing an article which is used by their family, and is properly classed as for the use and benefit of the family, but is not necessary for it. Section 2214 of the Code is as follows: "2214. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." That section was construed in Devendorf v. Emerson, 66 Iowa, 698, 24 N. W. 515, where it was held that family supplies sold to the wife, when the sale had been forbidden by the husband, there being no evidence that there was a necessity for the purchase, were not chargeable upon the property of the husband. Some prominence was given to the fact that, as a general rule, the husband is the one upon whom the family depends for support, and that he was supporting the family in that case, and had the right to decide of whom he would purchase the family supplies; but the decision did not wholly rest upon that fact. We think that the doctrine of that case is applicable to this, and that the husband cannot fix a liability, as against the wife, by purchasing articles for the family which are not needed by it, when she has, in effect, forbidden the purchase, refusing to be bound by it, and has duly notified the vendor of that fact.

We conclude that the demurrer of plaintiff was properly overruled, and the judgment of the district court is affirmed.[16]

BOSS v. JORDAN.

Supreme Court of Iowa, 1902. 118 Iowa, 204, 89 N. W. 1070.

[Action in equity to subject certain property of Laura A. Jordan to the satisfaction of a judgment against her husband. Decree for plaintiff. Defendants appeal.]

McCLAIN, J. Plaintiff's intestate recovered judgment against Henry Jordan on a promissory note executed to one Janns for alleged medical services, and brought this action to subject the property in question to the payment of that judgment, claiming that the medical services for which the note was given were a family expense for which Laura A. Jordan, as wife of the judgment defendant, was liable, under the language of Code, § 3165, which provides that "the expenses of the family * * * are chargeable upon the property of both husband and wife, or either of them." It is contended on behalf of appellant that the property of the wife cannot be subjected to a judgment against the husband for family expenses until a judgment has been rendered against her in a proceeding to which she is a party, and

16 Contra: Rotering v. Hibbard, 168 Minn. 502, 210 N. W. 395 (1926), where the suit was against the husband who had supplied his wife with cash, and had forbidden the plaintiff to sell to her on credit.

that, as no such judgment has ever been rendered in this case, Laura A. Jordan has not had her day in court with reference to the validity of plaintiff's claim, and has had no opportunity to show that the note was without consideration. It seems, however, to be well settled that the wife cannot inquire into the validity of an indebtedness created by the husband for family expenses, and that when an expense has been incurred by him for that purpose, for which he is liable, her property thereby becomes bound for its payment. Lawrence v. Sinnamon, 24 Iowa, 80; Smedley v. Felt, 41 Iowa, 588; Frost v. Parker, 65 Iowa, 178, 21 N. W. 507. It is not necessary to go so far in this case, for the wife was allowed to plead that the note on which the judgment was rendered was without consideration, and to introduce evidence to that effect if she could, but this defense was not established. That a creditor who has obtained a judgment against the husband for family expenses may in an equitable action subject the property of the wife to the payment thereof, without first recovering a judgment at law against the wife, is settled by Frost v. Parker, supra. * * *

Affirmed.[17]

[17] Contra, under a similar statute: George v. Edney, 36 Neb. 604, 54 N. W. 986 (1893).

In Lewis v. Lynch, 61 Ill. App. 476 (1895), it was held that, when the debt had been barred by the statute of limitations, the husband could not, by a new promise, revive the liability of the wife under a "family expense" statute (Rev. St. 1893, c. 68, § 15). Contra: Waggoner v. Turner, 69 Iowa, 127, 28 N. W. 568 (1886).

"Family expense" statutes do not relieve the husband of his primary duty of support, and, if the wife pays money for such purposes, she is entitled to reimbursement from the husband or his estate, unless she paid it under circumstances indicating that she did not expect to be repaid. Kosanke v. Kosanke, 137 Minn. 115, 162 N. W. 1060 (1917).

Support by way of alimony in cases of divorce and decrees for separate maintenance is discussed at pages 706–727 infra.

CHAPTER 6

ESTATES BY ENTIRETIES

HARDENBERGH v. HARDENBERGH.

Supreme Court of New Jersey, 1828. 10 N. J. Law, 42, 18 Am. Dec. 371.

EWING, C. J. By deed of bargain and sale, bearing date on the 31st day of August, 1822, and made "between William McKnight and Nancy his wife, of the county of Burlington, and state of New Jersey, of the first part, and James Hardenbergh and Elizabeth his wife, of the township of South Amboy, county of Middlesex and state of New Jersey, of the second part" the words, "and Elizabeth his wife," having been interlined after the deed was drawn and before it was executed, "the party of the first part," granted, bargained and sold "unto the said party of the second part, his heirs and assigns forever," a lot of land in the township of South Amboy, being the premises in question, to have and to hold, "unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever." Under this conveyance, James Hardenbergh, went into possession of the premises, built an house and made other improvements, and continued in possession until his decease. He died without issue. His wife, the lessor of the plaintiff, and one of the grantees in the deed survived him, and continued in possession of the premises for six months after his decease, at which time the defendant, who is the father of James Hardenbergh, entered, and continued, by his tenant in possession at the commencement of this action.

The lessor of the plaintiff, claims the whole premises under the above mentioned deed, and insists that she is entitled thereby to an estate in fee simple.

The counsel of the defendant, in the brief submitted to us, insists that the wife by force of the deed, "takes a joint estate with her husband for life, and then it goes over to his heirs in fee simple; a joint estate for life with remainder in fee to the husband," "a well known estate in the law;" and for example he refers to the 285th section of Littleton, which is in these words: "If lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold and the other a fee simple." To which Littleton, adds, "If he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." And Coke, in his comment says, "They are joint tenants for life and the fee simple in one of them."

The counsel of the defendant farther insists, that, "if the deed should be construed according to the claims of the plaintiff, still by force of our statute, Rev. Laws, 556, the lessor of the plaintiff, and her husband, were tenants in common."

It is manifestly unnecessary for us, in order to decide this cause, to enquire or determine whether the lessor of the plaintiff takes under the deed an estate for life, or an estate in fee simple, because if as the defendant insists, she took only an estate for life, and by virtue of our statute, as a tenant in common, the plaintiff, her life estate of one moiety subsisting, must be entitled in this action to judgment, to recover one moiety of the premises.

Inasmuch, however, as the plaintiff demands the whole premises, although to ascertain the duration of an estate of the lessor is not essential, yet the operation and extent of the statute respecting joint tenants and tenants in common, must be examined, because thereon depends the question whether the plaintiff is to recover the entirety or only a moiety.

Properly to understand the statute and safely and truly to construe it, we must first distinctly comprehend the nature of the estate which passes to husband and wife by a grant made to them during coverture.

A conveyance of lands to a man and his wife, made after their inter-marriage, creates and vests in them an estate of a very peculiar nature, resulting from that intimate union, by which as Blackstone says, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." The estate correctly speaking, is not what is known in the law by the name joint tenancy. The husband and wife are not joint tenants. I am aware that sometimes, and by high authority too, but currente calamo and improperly, as will, I think, be presently seen, the estate has been thus denominated. In respect however, to the name only, not to the nature of the estate, is any diversity to be found. The latter has been viewed in the same light as far back as our books yield us the means of research. The very name joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. Littleton, § 291 (665). Of an estate in joint tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety, if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized per my et per tout. Of husband and wife, both have not an undivided moiety but the entirety. They take and hold not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are, and each is seized of the whole. They are seized not per my et per tout, but solely and simply per tout. The same words of conveyance, which make two other persons joint tenants, will make husband and wife tenants of the

entirety. Lit. § 665; 2 Lev. 107; Ambler, 649; Moor, 210; 2 Bl. Rep. 1214; 5 T. R. 564–568; Vezey, 199; Rogers v. Benson, 5 Johns. Ch. (N. Y.) 437; 2 Kent, Com. 112. In a grant by way of joint tenancy, to three persons, each takes one-third part. In a grant to an husband and wife, and a third person, the husband and wife take one-half, and the other person takes the other half; and if there be two other persons, the husband and wife take one-third, and each of the others one-third. Lit. § 291. In joint tenancy, either of the owners may at his pleasure, dispose of his share and convey it to a stranger, who will hold undivided, and in common with the other owner. Not so with husband and wife. Neither of them can separately or without the assent of the other, dispose of or convey away any part. It has even been held where the estate was granted to a man and his wife, and to the heirs of the body of the husband, that he could not during the life of the wife, dispose of the premises by a common recovery, so as to destroy the entail; nor did his surviving his wife, give force or efficacy to the recovery. 3 Co. 5; Moor, 210; 9 Co. 140; 2 Vern. 120; Prec. Ch. 1; 2 Bl. Rep. 1214; Rober on Husband and Wife, 51. A severance of a joint tenancy may be made and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance. 3 Co. 5; 2 Bl. Rep. 1213. It has been held that a fine or common recovery by the husband during the marriage will work a severance, if the estate was granted to him and her before marriage, but if granted after marriage no severance will thereby be wrought. Ambler, 649. Joint tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition cannot be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby on the decease of one tenant, his companion becomes entitled to the whole estates. Between husband and wife the jus accrescendi does not exist. The surviving joint tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. The survivor of husband and wife, has no increase of estate or interest by the decease, having before the entirety, being previously seized of the whole. The survivor, it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected.

In the remarks I have made, it will have been observed, that the estates granted to husband and wife during marriage, has been the subject of examination. If lands be granted to a man and woman and their heirs, and afterwards they marry, they remain, as they previously were, joint tenants, they have moieties between them, as they originally took by moieties they will continue to hold by moieties after

the marriage, and the doctrine of alienation, severance, partition and of the jus accrescendi may apply. Co. Lit. 187, b, 2; Lev. 107; Ambler, 649. And to this kind of estate, Bacon may allude in the passage cited by the defendant's counsel. 3 Bac. Abr. tit. Joint Tenants, B. "Baron and feme may be joint tenants;" or more probably, judging from the context, he means to lay down the doctrine that they may hold an estate in joint tenancy with another person; for unless used in one of these senses, the clause is unsupported by the authority cited in the margin, and differs from the succeeding passages on the same page.

Having brought to our view, the nature of the estate of husband and wife, we may proceed to ascertain the applicability of the statute, respecting joint tenants and tenants in common to the case before us.

It is enacted "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common." But we have seen that the deed of James Hardenbergh and wife, would not anterior to that statute, have created an estate in joint tenancy, that the estate created thereby would not have been considered or adjudged to be of that class. It follows then, that it is not of that nature on which the statute was designed to operate. But the counsel of the defendant, appeals very properly to the preamble and to the light which may be thence shed on the intention of the legislature. It is in these words: "Whereas, estates granted or devised to a plurality of persons without any restrictive, exclusive, or explanatory words, have heretofore been held in this state, to be estates in joint tenancy, therefore be it enacted." The very same class of cases here, as in the enacting clause, is plainly designated. Such as had been held to be estates in joint tenancy. Moreover, the preamble mentions estates granted to a plurality of persons. But husband and wife, in contemplation of law are one person, not a plurality. We shall be the more satisfied with this construction, if we recur to the causes which induced the legislature to enact this law. The hardship, surprise and unanticipated consequences of the doctrine of survivorship, can rarely if, indeed, ever be felt in the case of husband and wife.

This statute then, does not operate on the deed before us. It is subject to the principles of the common law; and by them, the wife is entitled, the husband being dead, to the possession of the whole premises.

In the case of Shaw v. Hearsey, 5 Mass. 521, the Supreme Court of Massachusetts, held that the statute of that state, did not extend to conveyances to husband and wife, a statute substantially like ours, with this difference indeed, that the words "conveyances and devises to two or more persons," are there actually contained in the enacting clause, as the counsel of the defendant proposed to read them in our statute for greater elucidation. In New York, they have a similar

statutory provision; and in the cases of Jackson v. Stevens, 16 Johns. 115, and Jackson v. Cary, 16 Johns. 305, the Supreme Court decided that it did not extend to the case of husband and wife, and because their estate was not a joint tenancy. It is true, as remarked by the defendant's counsel, their statute has no such preamble. But hence, I apprehend their cases are entitled to more, not less, consideration. The preamble makes the scope of our statute more clear. In the state of Virginia, a similar decision has been made in the case of Thornton v. Thornton, reported in 3 Randolph, 179, although the words of the Virginia statute "of whatever kind the estates or thing, holden or possessed be," are much more favourable to such a construction as the counsel of the defendant has sought to establish for our statute.

Upon the whole, I am of opinion the plaintiff is entitled to recover the whole premises in controversy.[1]

[The separate opinion of DRAKE, J., is omitted.]

HILES v. FISHER.

Court of Appeals of New York, 1895. 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762.

[In 1866 the owner of certain lands conveyed them to "William R. Fisher of the Town, County and State aforesaid, and Maria J. Fisher, his wife." The wife paid the entire consideration but consented to the form of the deed. William R. Fisher and his wife are the defendants in possession. The plaintiff claims title against them by virtue of a mortgage executed by the husband William R. Fisher alone and a foreclosure of said mortgage. The General Term adjudged that by the sale under the mortgage the plaintiff acquired the right of possession of the whole property during the joint lives of Mr. and Mrs. Fisher and of the fee in case the husband survived the wife.]

ANDREWS, C. J. It was decided in Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361, that the separate property acts relating to the rights of married women had not abrogated the common-law doctrine, that

1 The weight of authority under statutes declaring the nature of the estate created by a conveyance to two or more persons, but not expressly mentioning husband and wife, is in accord. See Settle v. Settle, 56 App. D. C. 50, 8 F.(2d) 911, 43 A. L. R. 1079 (1925).

In some states, however, where no statutes affect the problem, it has been held that such an estate could not be created. Whittlesey v. Fuller, 11 Conn. 337 (1836); Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553 (1826). In some states the result may have been affected by the spirit of the Married Women's Statutes. Kerner v. McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550 (1900); Helvie v. Hoover, 11 Okl. 687, 69 P. 958 (1902). But estates by the entireties are generally allowed unless abolished by statute. Baker v. Stewart, 40 Kan. 442, 19 P. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213 (1888).

In Platt v. Platt, 93 N. J. Eq. 395, 116 A. 326 (1922), two husbands and their wives were held to own land as tenants by the entireties within each couple; each couple being a tenant in common with the other couple.

under a conveyance to husband and wife they take not as tenants in common, nor as joint tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife as survivor took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife, during their joint lives, was not considered or decided, but was expressly reserved on the ground that it was not involved in the case then before the court. That question is involved in the present case and must now be decided.

The decision in Bertles v. Nunan is supported by the great weight of authority in other jurisdictions in this country, but in some of the states it has been held that as a consequence of statutory provisions substantially like those in this state, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands, as femes sole, estates by entireties have been abrogated and turned into tenancies in common. In the states where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that notwithstanding the legislation a conveyance to husband and wife retains its common-law character, and incidents. If the right of the husband to the use during the joint lives of lands held under this tenure was a right growing out of and incident to this particular species of tenancy, —in other words, if it was one of its specific and essential characteristics,—then it would be impossible to segregate this right from the other rights incident to and flowing from the tenancy, and to say that while the estate by entireties continues this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right operating upon property so held, as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 Bl.

Comm. 182; Washb. Real Prop. 425. Each is said to be seised of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained, that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in Miner v. Brown, 133 N. Y. 308, 31 N. E. 24, and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common that estate would be created. See, also, McDermott v. French, 15 N. J. Eq. 78; Wales v. Coffin, 13 Allen (Mass.) 213; 1 Washb. Real Prop. 425.

There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See In re March, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards. Co. Lit. 187b. It was seen to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important in view of the subsequent discussion to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship in the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seisin or a joint possession for the purpose of the use during coverture. The husband was held to be entitled to the full control and to take the rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors. Barber v. Harris, 15 Wend. 615; Jackson v. McConnell, 19 Wend. 175, 32 Am. Dec. 439; Meeker v. Wright, 76 N. Y. 262; Bertles v. Nunan, supra; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the

entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from the general principle of the common law which vested in the husband jure uxoris the rents and profits of his wife's lands during their joint lives. 2 Kent, Comm. 130; Stew. Husb. & Wife, § 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits and control of lands held by him and his wife in entirety, during their joint lives, it is important to regard not only the language, but the spirit of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands jure uxoris, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property.

In determining the question now before us, too much emphasis cannot be placed upon the fact that the legislation of 1848, and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife and the right to exclude her from its enjoyment. If it still held, notwithstanding this legislation, that the husband takes the whole rents and profits during coverture in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and es-

tate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives. Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in McCurdy v. Canning, 64 Pa. 39, or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right jure uxoris, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife of the premises subject to her right of survivorship. The opinion of the general term exhibits, with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives the wife. See 1 Washb. Real Prop. 425; 1 Prest. Est. 135; Ames v. Norman, supra.

The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without costs to either party. All concur, except HAIGHT, J., not sitting.

Judgment accordingly.[2]

[2] Accord: Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97 (1899); Bilder v. Robinson, 73 N. J. Eq. 169, 67 A. 828 (1907); Gasner v. Pierce, 286 Pa. 529, 134 A. 494 (1926). Contra: Morrill v. Morrill, 138 Mich. 112, 101 N. W. 209, 110 Am. St. Rep. 306 (1904); Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, 51 A. L. R. 1100 (1927), and earlier authorities there cited. See comment in 5 N. C. L. Rev. 366.

AMERICAN WHOLESALE CORPORATION et al. v. ARONSTEIN et al.

Court of Appeals of District of Columbia, 1926. 56 App. D. C. 126, 10 F.(2d) 991.

Suit by the American Wholesale Corporation and another against Aron Aronstein and others. From a decree of dismissal, plaintiffs appeal. Affirmed.

Before MARTIN, Chief Justice, VAN ORSDEL, Associate Justice, and GRAHAM, Presiding Judge of the United States Court of Customs Appeals.

MARTIN, Chief Justice. This is an appeal from a decree dismissing a creditors' bill, brought by appellants as judgment creditors of Aron Aronstein, seeking to set aside certain conveyances of real estate made by him to his wife, Yette Aronstein, as in fraud of his creditors, and to subject the estate so conveyed to the payment of their judgments. The controlling facts in the case are beyond dispute.

In the year 1920 Aron Aronstein purchased and with his own money paid for two separate parcels of real estate, situate within the District of Columbia, one of which was used by him and his family as a residence and retail store; the other was an apartment house which was rented for about $350 a month. The property was conveyed to Aronstein and his wife by deeds of conveyance under which they became tenants by the entireties. It does not appear that Aronstein was insolvent at that time.

Afterwards, to wit, in the year 1923, Aronstein became indebted to the appellants, respectively, upon certain promissory notes, which in the year 1924 were reduced to judgment and are yet unpaid. In the year 1923, Aronstein, being then liable upon said notes and being then insolvent, executed and delivered to his wife two several deeds, purporting to convey to her his interest in the real estate above referred to.

The appellants charge that the aforesaid original conveyance to Aronstein and his wife was a fraud upon his creditors, for the reason that she paid no part of the consideration for the property; also that the conveyance subsequently made by Aronstein to his wife for his interest in the property was without consideration, and was made with intent to hinder, delay, and defraud appellants in the collection of their claims. They pray that the deed of conveyance to Aronstein and his wife be "modified of record to show the fee-simple title in the said defendant, Aron Aronstein, subject to the dower rights of his wife, Yette Aronstein"; that the conveyance from Aronstein to his wife for his interest in the property be set aside; that a receiver be appointed to collect the rents and profits of the properties; and that the property, or Aronstein's interest therein, be sold, and the proceeds applied to the payment of appellants' claims.

We think that the decree dismissing the bill was right. At the time when the original conveyance was made to Aronstein and his wife, the

former was solvent, and moreover the claims of the appellants against him were not then in existence. Accordingly the appellants cannot attack that conveyance. As to the conveyance subsequently made by Aronstein to his wife, the estate was held by them as tenants by the entireties, and the appellants were not entitled to subject the separate interest of Aronstein to the payment of their claims. His conveyance to his wife accordingly could not hinder or delay them in the collection of their judgments.

Under the doctrine of estates by the entireties, neither husband nor wife may convey any interest in the estate to a stranger without the consent of the other, nor can either enforce a partition thereof without the other's consent. Settle v. Settle (D. C. Sup.) 52 Wash. Law Rep. 433. From the nature of such an estate there must be unity of estate, unity of control, and unity in conveying or incumbering it; hence a mortgage executed by the husband is void. Chandler v. Cheney, 37 Ind. 391. The husband has no interest in either the fee or the usufruct of the estate which may be taken in execution for his sole claim. Corinth v. Emery, 22 A. 618, 63 Vt. 505, 25 Am. St. Rep. 780; Dickey v. Converse, 76 N. W. 80, 117 Mich. 449, 72 Am. St. Rep. 568.

A judgment against the husband is not a lien on the land, nor can his interest be sold under an execution. The husband and wife, holding as tenants by the entirety, may convey the estate to a purchaser free and clear from an outstanding judgment against the husband; such judgment not constituting a lien on the land, or on the interest of the husband therein. Jordan v. Reynolds, 66 A. 37, 105 Md. 288, 9 L. R. A. (N. S.) 1026, 121 Am. St. Rep. 578, 12 Ann. Cas. 51. In Bruce v. Nicholson, 13 S. E. 790, 109 N. C. 202, 26 Am. St. Rep. 562, it was held that, where husband and wife hold lands by entireties, neither can convey or incumber the estate without the assent of the other, nor can the interest of either become subject to the lien of a judgment, or to any proceeding to sell for the satisfaction thereof during their joint lives. In Almond v. Bonnell, 76 Ill. 537, it was held, where land is held by husband and wife as tenants by the entirety, as at the common law, the sale of the same on execution against the husband, followed by a sheriff's deed, will fail to pass any title. In Beihl v. Martin, 84 A. 953, 236 Pa. 519, 42 L. R. A. (N. S.) 555, it was held that, where a husband and wife hold an estate in land by entireties, their joint deed is sufficient to pass title in the land free from the effect of bankruptcy proceedings and judgments against the husband, and free from any contingent interest or ownership therein by the trustee in bankruptcy, in the event of the bankrupt surviving his wife. See, also, In re Beihl (D. C.) 197 F. 870.[3]

[3] But see Fleek v. Zillhaver, 117 Pa. 213, 12 A. 420 (1887), where there was a judgment against the husband, then a mortgage by both husband and wife, then the wife died, and it was held that the judgment had priority over the mortgage. See, also, Hetzel v. Lincoln, 216 Pa. 60, 64 A. 866 (1906), where

We have been cited to other authorities, which are partly or wholly inconsistent with those above referred to, but upon a consideration of all of them we conclude that no relief can be afforded to the appellants in this case, since in effect they are seeking to enforce execution for the collection of their judgments against an estate which from its nature is not subject to such a process.

The decree of the lower court is affirmed, with costs.[4]

BERNATAVICIUS v. BERNATAVICIUS.

Supreme Judicial Court of Massachusetts, 1927. 156 N. E. 685, 52 A. L. R. 886.

Petition for partition of land by Michalina Bernatavicius against Raphael Bernatavicius. From decree for petitioner, defendant appeals and case was reported. Decree affirmed.

RUGG, C. J. This is a petition for partition of land conveyed to the parties hereto as tenants by the entirety when they were husband and wife. Subsequently they were divorced by a decree of court, now become absolute, which did not make any disposition of the property of the parties. The question thus presented for decision for the first time in this commonwealth is whether a divorce absolute destroys a tenancy by the entirety previously existing in libelant and libelee and operates to change it into a simple joint tenancy or a tenancy in common and thus renders it subject to partition.

The nature of a tenancy by the entirety is thoroughly established by our decisions. It is founded on the common-law doctrine of the unity of husband and wife as constituting in law but one person. A conveyance to a husband and wife as tenants by the entirety creates one indivisible estate in them both and in the survivor, which neither can destroy by any separate act. Both husband and wife are seised of such an estate per tout et non per my as one person, and not as joint ten-

it is said that a judgment against the husband is a "defeasible lien" upon his estate, which will become absolute if he survives.

[4] Contra: Moore v. Denson, 167 Ark. 134, 268 S. W. 609 (1925). See comment in 9 Minn. L. Rev. 683.

To the effect that a husband may release his interest in such an estate to his wife, see Enyeart v. Kepler, 118 Ind. 34, 20 N. E. 539, 10 Am. St. Rep. 94 (1889). See, also, Meeker v. Wright, 76 N. Y. 262 (1879).

In Wright v. Knapp, 183 Mich. 656, 150 N. W. 315 (1915), it was held that a deed from a husband to himself and his wife created a tenancy in common. Estate of Klatzl, 216 N. Y. 83, 110 N. E. 181 (1915), contra. In Howell v. Wieas, 232 Mich. 227, 205 N. W. 55 (1925), where a husband gave a deed which was in fact a mortgage, to a third person, who, upon payment of the debt, reconveyed to the husband and wife, a tenancy by the entireties was created.

As to whether a transfer tax is payable upon a conveyance from one spouse to both as tenants by the entireties, see Estate of Klatzl, supra; Lyon's Estate, 233 N. Y. 208, 135 N. E. 247 (1922); In re Vogelsang's Estate, 122 Misc. Rep. 599, 203 N. Y. S. 364 (1924).

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ants or tenants in common. Alienation by either the husband or the wife will not defeat the right of the survivor to the entire estate on the death of the other. There can be no severance of such estate by the act of either alone without the assent of the other, and no partition during their joint lives, and the survivor becomes seised as sole owner of the whole estate regardless of anything the other may have done. The tenancy by the entirety is essentially a joint tenancy modified by the common-law theory of the unity of husband and wife. They do not take by moieties but by entireties. The characteristics of a tenancy by the entirety at common law continue unaffected by the modern statutes designed to ameliorate the rights of married women at common law and to render more flexible and individual the property rights of husband and wife. These principles are amplified and applied to diverse sets of facts in numerous of our decisions. Shaw v. Hearsey, 5 Mass. 521; Wales v. Coffin, 13 Allen, 213; Pierce v. Chace, 108 Mass. 254; Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; Pease v. Whitman, 182 Mass. 363, 65 N. E. 795; Boland v. McKowen, 189 Mass. 563, 76 N. E. 206, 109 Am. St. Rep. 663; McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52, 102 Am. St. Rep. 339; Hoag v. Hoag, 213 Mass. 50, 99 N. E. 521, Ann. Cas. 1913E, 886; Palmer v. Treasurer and Receiver General, 222 Mass. 263, 110 N. E. 283, L. R. A. 1916C, 677; Voight v. Voight, 252 Mass. 582, 147 N. E. 887; Raptes v. Cheros, 259 Mass. 37, 155 N. E. 787.

The effect of a divorce upon such a tenancy has never been alluded to in our decisions, so far as we are aware. The quality of an estate by the entirety is established by the deed of conveyance upon its delivery and acceptance, or by proof of the will if created by devise. Naturally the quality of that estate continues until it is changed by deed of both parties, or possibly of one party directly or indirectly to the other, or by the death of one of the parties. Tenancy by the entirety as a legal conception came into existence when divorce was exceedingly rare, if not impracticable. It has been said that in England divorce continued to be within the cognizance of the ecclesiastical courts until the passage of the matrimonial causes act (20 & 21 Vict. c. 85), which became operative not earlier than January 1, 1858. R. C. L. p. 243, § 2. It was stated in Sparhawk v. Sparhawk, 116 Mass. 315, in a learned opinion by Chief Justice Gray, that jurisdiction over the subject of divorce in this commonwealth from the time of the Province Charter was reserved to the Governor and council as the Supreme Court of Probate, and within three years after the adoption of the Constitution was vested by act of the Legislature in the Supreme Judicial Court. Divorce in this commonwealth is wholly the creature of statute. It always has been provided, even until the present, that the procedure in divorce conforms in part, if not entirely, to the course of proceedings in ecclesiastical courts. G. L. c. 208, § 33. Historically divorce was not a branch of the common law. So far as concerns our own jurisprudence, divorce has been superimposed by legislation upon

the doctrines of the common law touching real estate and the several kinds of estates recognized by it. Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488. See, as to early legal notions concerning the nature of divorce, Barber v. Root, 10 Mass. 260, 265. It follows that the common law, in the development of estates by the entirety, had no occasion to pay any heed to divorce. Divorce now having become a part of our system of law, its effect upon estates by the entirety must be considered and determined in the light of historical considerations and the general present state of the law concerning domestic relations and real estate titles.

Divorce is not an act of the parties. It is an act of the law. Although the aid of the courts must be invoked by either the husband or the wife, and not by either except during the lives of both (Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653), nevertheless, the severance of the marriage tie by divorce is accomplished by a decree of court and by that alone. That act of the law creates a new legal status, both for the husband and for the wife. It divides the common-law unity hitherto existing. It creates two individuals in place of the unity theretofore recognized by the common law as existing. It substitutes for that unity two persons who thereafter are strangers to each other in their legal status. Except as provision is made by decree of court with respect to property and except with reference to their children, the man and woman who previously were husband and wife are to each other as if they had never been married. Divorce establishes a legal situation with respect to the man and woman previously husband and wife which is incompatible with the legal theory of tenancy by the entirety. The foundation and continuance of a tenancy by the entirety are inconsistent with the legal conception of a man and woman no longer in a state of matrimony toward each other. When persons who have been tenants by the entirety cease to be husband and wife, the legal factors necessary to that tenancy have gone out of existence. A tenancy by the entirety cannot be created by the most explicit words in a legal instrument, unless the man and woman are in truth husband and wife. Morris v. McCarty, 158 Mass. 11, 32 N. E. 938. It seems to us more in harmony with the principles governing such tenancies to hold that they cannot continue after the tenants have become divorced and thus have ended the legal relationship to each other, which constitutes the essence of that tenancy. The great weight of authority supports this conclusion. Stelz v. Shreck, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475; Donegan v. Donegan, 103 Ala. 488, 15 So. 823, 49 Am. St. Rep. 53; Harrer v. Wallner, 80 Ill. 197, 202–204; Lash v. Lash, 58 Ind. 526, 529; Meyers v. East End Loan & Savings Association, 139 Md. 607, 612, 116 A. 453; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581; Sbarbaro v. Sbarbaro, 88 N. J. Eq. 101, 102 A. 256; Hayes v. Horton, 46 Or. 597, 600, 81 P. 386; Whitley v. Meador, 137 Tenn. 163, 166, 192 S. W. 718, L. R. A. 1917D, 736; Davis v. Bass, 188 N. C. 200, 207, 208,

124 S. E. 566; Doherty v. Russell, 116 Me. 269, 272, 101 A. 305; Thornley v. Thornley, L. R. (1893) 2 Ch. 229. The same rule prevails as to community property. Kirkwood v. Domnau, 80 Tex. 645, 647, 648, 16 S. W. 428, 26 Am. St. Rep. 770; Biggi v. Biggi, 98 Cal. 35, 38, 32 P. 803, 35 Am. St. Rep. 141; Ambrose v. Moore, 46 Wash. 463, 466, 90 P. 588, 11 L. R. A. (N. S.) 103. The only decisions to the contrary which have come to our attention are In re Appeal of Nellie Lewis, 85 Mich. 340, 48 N. E. 580, 24 Am. St. Rep. 94; Alles v. Lyon, 216 Pa. 604, 66 A. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137. See in this connection Westerlund v. Hamlin, 188 Wis. 160, 205 N. W. 817. The rule in Michigan now has been changed by statute. Montgomery v. Montgomery, 221 Mich. 31, 34, 190 N. W. 687.

It remains to consider whether upon divorce a simple joint tenancy springs into being, or whether tenancy in common arises. It was said in Park v. Parker, 216 Mass. 405, 407, 103 N. E. 936, 937, that:

"Joint tenancy and its doctrine of survivorship are not in harmony with the genius of our institutions, nor are they much favored in law. Burnett v. Pratt, 22 Pick. 556."

Our statutes tend in the same direction. Express words are necessary in a deed or devise (except as to trusts) to create a joint tenancy. G. L. c. 184, § 7. These considerations lead us to the opinion that the operation of a divorce of the parties upon a tenancy by the entirety creates a tenancy in common. The decisions hitherto cited are to that effect.

It follows that the petitioner is entitled to partition.

Decree affirmed.

ALLES v. LYON.

Supreme Court of Pennsylvania, 1907. 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791.

[Case stated to determine the marketable title to real estate. It appeared that the plaintiff, Louisa Alles, was divorced from John P. Reis. Reis and the plaintiff held the land in question as tenants by entireties. The court entered judgment for the plaintiff for $1,775. The defendant appealed.]

Opinion by Mr. Chief Justice MITCHELL. * * * Coming now to the main question in the case, we are of opinion that the court below erred in holding that the estate by entireties was severed by the subsequent divorce of the husband and wife.

The subject is very bare of authorities. The law as to divorce prevented this question from arising in the earlier English cases, and in the few cases reported in this country the decisions, all more or less affected by statutes, are at variance, with no clear preponderance in either way. Lewis' Appeal, 85 Mich. 340, 48 N. W. 580, 24 Am. St.

Rep. 94, may be regarded as the best discussion in favor of the view that the nature of the estate is not changed, and Ames v. Norman, 36 Tenn. 683, 70 Am. Dec. 269, as the best on the other side.

The question has not previously come before this court, and we are left to decide it on general principles.

An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage. Being regarded as one person in law they take not in parts or shares, like joint tenants or tenants in common, but each takes the whole, or in the ancient phrase they are seized, not per mie et per tout, but per tout only. Incident to this estate as to joint tenancy is the right of survivorship, with this difference, that on the death of husband or wife the survivor takes no new title or estate; he or she is in possession of the whole from its inception. It was early held that our act of March 31, 1812 (5 Smith's Laws, p. 395), abolishing survivorship in joint tenancy, did not affect estates by entireties. Robb v. Beaver, 8 Watts & S. 107 (111). And the same view has been taken of the married women's Acts of April 11, 1848 (P. L. 536), and later. Diver v. Diver, 56 Pa. 106; Bramberry's Est., 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64.

The general subject of estates by entireties is learnedly discussed by Lewis, C. J., in Stuckey v. Keefe's Ex'rs, 26 Pa. 397, our leading case. It was there held that a conveyance to husband and wife, their heirs and assigns, "as tenants in common, and not as joint tenants" created an estate by entireties, and the opinion was strongly expressed that the estate arose by virtue of "a rule of law founded on the rights and incapacities of the matrimonial union" and therefore that the intention was immaterial. No subsequent case has gone so far, and in Merritt v. Whitlock, 200 Pa. 50, 49 Atl. 786, it was said that it may be considered as still an open question whether husband and wife may not, since the married women's property acts, take as well as hold in common if that be the clear actual intent, notwithstanding the presumption to the contrary.[5]

The argument for the change by divorce from an estate by entireties to a tenancy in common rests on the assumption that as the basis of the estate is the unity of person, a severance of that unity carries with it a severance of the estate; that as after divorce an estate by entireties could not be created between the parties it cannot be continued.

[5] It was held, in Blease v. Anderson, 241 Pa. 198, 88 A. 365 (1913), that a tenancy in common may be created, where such an intent is clear. Accord: Fladung v. Rose, 58 Md. 13 (1881), reviewing the authorities; Joos v. Fey, 129 N. Y. 17, 29 N. E. 136 (1891). But a conveyance to husband and wife "jointly" creates an estate by the entireties. Miner v. Brown, 133 N. Y. 308, 31 N. E. 24 (1892).

In Fay v. Smiley, 201 Iowa, 1290, 207 N. W. 369 (1926), it was held that a conveyance to husband and wife "as tenants by the entireties and not as tenants in common" did not create an estate by the entireties. See comment in 12 Iowa, L. Rev. 415.

But this view fails to give due weight to the rule that the quality of the estate is determined at its inception. It arises not out of unity of person alone, but out of unity of person at the time of the grant. "If an estate be made to a man and woman and their heirs, before marriage, and after [wards] they marry, the husband and wife have moieties between them." Coke Litt. 187b; and see 2 Cruise's Digest, 494, and 2 Plowden, 483, cited in Stuckey v. Keefe's Ex'rs, 26 Pa. 397. No stronger illustration could be given. If subsequent unity of person cannot change a tenancy in common to one by entireties, e converso a subsequent severance of the unity of person ought not to change a tenancy by entireties to one in common. In entire accordance is our latest case (Hetzel v. Lincoln, 216 Pa. 60, 64 Atl. 866), where a conveyance to husband and wife "jointly" was held to create an estate by entireties which continued with its incident of survivorship, although the husband had conveyed his interest to the wife as "the undivided one half" and they had subsequently executed a mortgage in which the conveyance by the husband was referred to. A creditor had obtained a judgment against the husband and after his death sought to revive it against his administrator, with notice to the wife as terretenant, on the ground that they had become tenants in common, but it was held that he could take nothing. "Whatever may have been the intention of the husband" said our Brother Brown, "the right of the wife was fixed by the deed from Reed. By it each held an entirety and upon the death of either the estate would vest absolutely in the other as the survivor. The husband conveyed nothing to the wife that she would not have enjoyed if she survived him, which she did." The decisions and the statutes, referred to supra, go to show that in regard to the nature and qualities of an estate by entireties the general rule of law applies that they are determined at the inception of the estate.

In the present case, therefore, the parties took an estate by entireties at the time of the grant. By it the husband took a vested estate to which was incident a right of survivorship. That estate could not be divested, or stripped of any of its incidents except by express statutory provision existing at the time of its inception. The divorce severed the unity of person for the future, but it could not avail retrospectively to sever the vested unity of title and possession.

[Remainder of opinion omitted.]

Judgment reversed, and judgment directed to be entered for the defendant.[6]

[6] In Ebersole v. Goodman, 74 Pittsb. Leg. J. (Pa.) 478, 839 (1926), a Pennsylvania nisi prius court held a Pennsylvania statute (Act May 13, 1925, P. L. 649), which gave to a divorced spouse the right to partition an estate by the entireties, unconstitutional, as a taking of property without due process of law. See 52 A. L. R. 890, for a note on "Divorce as Affecting Estate by Entireties."

PHELPS v. SIMONS et al.

Supreme Judicial Court of Massachusetts, 1893. 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

LATHROP, J. This is a bill in equity against Catharine L. Simons and Simeon B. Simons, her husband. Sarah C. Simons, the mother of Simeon, died on April 8, 1872. By her will, dated October 31, 1870, which has been duly admitted to probate, she devised and bequeathed the residue of her estate, real and personal, to her "son, Simeon B. Simons, and his wife, Kate L. Simons, and to the survivor of them, and the heirs of such survivor, to have and to hold the same forever." Sarah died possessed, among other property, of twelve shares of the capital stock of the Second National Bank of Springfield. On December 3, 1872, said bank issued a certificate of said shares, in which it is set forth that "Simeon B. Simons and his wife, Kate L. Simons, and the survivor of them, and the heirs of such survivor," are proprietors of twelve shares of the capital stock of said bank. The answer of the defendant Catharine, which is found to state the facts correctly, sets forth that she has possession of said certificate, "which was left in her possession several years since by her said husband."

On October 15, 1891, Simeon B. Simons, by an instrument in writing, undertook to sell said certificate, and the twelve shares of stock represented thereby, to the plaintiff, for a valuable consideration. He also, by the instrument, appointed the plaintiff his attorney to make the transfer. The bank refused to make the transfer until the outstanding certificate was delivered up, and Catharine refused to deliver up the certificate. The prayer of the bill is that Catharine be ordered to produce the outstanding certificate, and to deliver the same to the plaintiff.

In 1870, when this will was made, and in 1872, when it was admitted to probate, the General Statutes were in force; and it was provided by chapter 108, § 1, that "the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, * * * shall, notwithstanding her marriage, be and remain her sole and separate property." Mr. Justice HOLMES, Mr. Justice BARKER, and the writer of this opinion think that under this statute Simeon B. Simons had no power to alienate his wife's interest, believing that the case of Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462, which relates to the validity of a lease made by a husband while the joint tenancy continued, has no bearing on the question. The same justices also think that, whatever may be the effect of the various statutes then in force as to the estate which the husband and wife took, the wife was entitled, as between herself and her hus-

band, to one half to her separate use. See Mander v. Harris, 27 Ch. D. 166; Jupp v. Buckwell, 39 Ch. D. 148. But the other justices are of opinion, on the authority of Pray v. Stebbins, that Gen. St. c. 108, § 1, does not apply, and we proceed to consider the case irrespective of the statutes relating to married women.

At common law a devise to husband and wife vested in them an estate by entireties; not strictly a joint tenancy, but, as said by Mr. Justice Wells in Wales v. Coffin, 13 Allen, 213, 215, "one indivisible estate in them both, and the survivor of them." See also, Pierce v. Chace, 108 Mass. 254; Pray v. Stebbins, 141 Mass. 219, ubi supra; Donahue v. Hubbard, 154 Mass. 537, 28 N. E. 909, 14 L. R. A. 123, 26 Am. St. Rep. 271; Morris v. McCarty, 158 Mass. 11, 32 N. E. 938.

While the husband has the entire right to the use and benefit of the estate during coverture, (Pray v. Stebbins, ubi supra,) he cannot alienate it. Thus in Fox v. Fletcher, 8 Mass. 274, where land was devised to a husband and wife, the wife, who survived her husband, was held entitled to maintain a real action against a grantee in fee of her husband. So in Donahue v. Hubbard, ubi supra, it was said by Mr. Justice Allen: "The peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other."

The bequest in this case is to the husband and his wife, "and the survivor of them, and the heirs of such survivor." A conveyance in this form, at common law, to persons not husband and wife would give a joint estate for life, and a contingent remainder to the survivor. 2 Cruise, Dig. tit. 18, c. 1, § 2, note; 1 Greenl. Cruise, 364a; Co. Litt. 191a; In re Harrison, 3 Anst. 836; Vick v. Edwards, 3 P. Wms. 372; Hannon v. Christopher, 34 N. J. Eq. 459.

The plaintiff admits that at common law a bequest to husband and wife vests in them an estate by entireties. See Gordon v. Whieldon, 11 Beav. 170; Atcheson v. Atcheson, 11 Beav. 485. He contends, however, that, as at common law a husband may dispose of his wife's personal property as he pleases, he has the same right where the property is held by entireties. None of the cases which he cites for this position support it. There is no doubt that shares of stock may be bequeathed to a wife for life, with remainder to B. In such a case, at common law, the husband could dispose of only the life interest of his wife in the shares; and where the shares are left by will to a husband and wife, the latter takes a life interest with her husband, and a remainder contingent on her surviving him. With the latter, a court of equity will not permit him to meddle. In Atcheson v. Atcheson, 11 Beav. 485, where a legacy was left to a husband and wife, it was held that the wife's right to it by survivorship was entitled to protection, and it was ordered that the legacy be carried to the joint account of the husband and wife, with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply.

In Moffatt v. Burnie, 18 Beav. 211, a bequest was made to A. and his wife, for their lives, with remainder over, and it was held that the husband and wife took, not in joint tenancy, but for their joint lives and the life of the survivor.

In Ward v. Ward, 14 Ch. D. 506, where a husband and wife held an annuity by entireties, it was held that the whole of it was, during their joint lives, liable to the husband's debts, but the order was only to pay during the life of the husband. See also Godfrey v. Bryan, 14 Ch. D. 516; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76, 105.

It follows, in the opinion of a majority of the court, that Mrs. Simons will be entitled to the shares of stock should she survive her husband. The mere fact that the husband placed the certificate in the possession of his wife gave her no additional rights. Cummings v. Cummings, 143 Mass. 340, 9 N. E. 730.

The result is that the plaintiff is entitled to the dividends on the stock during the joint lives of the husband and wife, and is entitled to the shares in the contingency of the husband surviving his wife. If, however, the wife survives her husband, she is entitled to the shares absolutely.

As the bank has not been made a party to this suit, no order can be passed directing it to do anything. And, as the wife has an interest in the shares, there is no ground for directing her to deliver the certificate to the plaintiff, as the case now stands. If, before a final decree is entered, the plaintiff desires to amend his bill by making the bank a party, and to have a trustee appointed to hold the shares in accordance with this opinion, he may apply to a single justice for this purpose.

So ordered.[7]

The CHIEF JUSTICE and Justices KNOWLTON and MORTON, think that the statutes enabling married women to take, hold, manage, and dispose of real and personal property as if they were sole, do not apply to the estate or title by entireties of husband and wife in personal property any more than in real property. Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462. They also think that the will vested in the husband, and wife a title by entireties in the shares in question. It follows that the power over the shares is to be settled by the common law. By that law the husband became, upon mar-

[7] Most of the jurisdictions which permit the creation of a tenancy by the entireties in land permit it also as to personal property. See Parry's Estate, 188 Pa. 33, 41 A. 448, 49 L. R. A. 444, 68 Am. St. Rep. 847 (1898); Corey v. McLean, 100 Vt. 90, 135 A. 10 (1926). See, also, 30 A. L. R. 905.

In Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724 (1908), equity protected the interest of the heirs of the deceased wife, when the title had been taken by the entireties without her proper authority. See, also, Matter of Albrecht, 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700 (1892); Garris v. Tripp, 192 N. C. 211, 134 S. E. 461 (1926).

Whether, when one tenant by the entireties murders the other, he nevertheless takes the estate, is a question usually discussed in the course in trusts.

riage, the absolute owner of all the wife's chattels in possession. Legg v. Legg, 8 Mass. 99; Com. v. Manley, 12 Pick. 173.

Upon reducing her choses in action to possession, he became the absolute owner of them also. Hayward v. Hayward, 20 Pick. 517. If he did not reduce them to possession, and she survived him, she took them by virtue of her survivorship. Hayward v. Hayward, ubi supra. If, therefore, these shares had belonged absolutely to the wife, the husband could have disposed of them at common law, as he has done, and thus would have extinguished completely the wife's right of survivorship. But these shares were not the wife's. The title to them was in the husband and wife by entireties. The whole of the title was in the husband, as well as in the wife. Her right of survivorship cannot possibly be greater when the whole title is in her husband as well as in herself, than when it is solely in herself. No case to which we have been referred holds that at common law the wife has a right of survivorship in a chose in action, either belonging solely to herself, or to her husband and herself by entireties, which is incapable of extinguishment by the husband in his lifetime. On the contrary, it was said in substance, in Atcheson v. Atcheson, 11 Beav. 485, which is relied on by the majority of the court, and which was a case of a legacy to a husband and wife, that her right to the whole as survivor was dependent on the fact that it had not been disposed of by the husband in his lifetime; and in Ward v. Ward, 14 Ch. D. 506, it was distinctly held that the wife's right as tenant by the entirety of an annuity given to herself and husband during their joint lives was not property of the wife, out of which a settlement could be made under direction of the court for her benefit.

The cases in regard to the husband's right over the wife's real estate, or over real estate belonging to himself and wife by entireties, stand on different ground, and furnish no guide in a case like this. No doubt, when an assignee in insolvency of the husband or his creditors comes into equity to compel a conveyance of the wife's choses in action, the court may require a provision for the wife to be made out of the property which they seek to reach, even to the extent perhaps of requiring the whole property to be applied to her benefit. Such was the case of Davis v. Newton, 6 Metc. 537, 543. It may also be true that, where a husband and wife are possessed of personal property per my et per tout, a court of equity will, for good reasons, protect the wife's right of survivorship by preventing the husband before he has done so from disposing of the property during their joint lives. Such was the case of Ward v. Ward, ubi supra, 14 Ch. Div. 506. But neither the principle of Davis v. Newton nor that of Ward v. Ward applies here. The wife's title by the entirety with her husband was not her separate property; and the husband has conveyed to the plaintiff, by an absolute conveyance for a valuable consideration, the whole title to the shares in question, as he has the right to do at common law, and has extinguished the wife's right of survivorship.

It is conceded that the mere fact that the certificate was placed in her possession by her husband gave her no additional rights.

We think that there should be a decree in favor of the plaintiff.

NOTE ON COMMUNITY PROPERTY.

"The statute defining the rights of husband and wife provides in its first section that 'all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property both real and personal, owned by the husband before marriage and that acquired by him afterwards, by gift, bequest, devise or descent, shall be his separate property;' and, in the second section, that 'all property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property;' and, by the ninth section, the husband is invested with the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.

"These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer, or mere intent of parties, can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved." Field, J., in Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538 (1859).

"The community system occupies itself with two kinds of property; separate property being as essential to the system as community property. It is rather easier to define separate than community property, and one may thereafter say, to cover up his difficulty, that all other is community. All property possessed at the time of marriage by either spouse, and all acquired thereafter by gift, devise, or descent, is separate. All other property is community. But one may do a little better than that, by indicating the chief sources of acquisition of community property, to wit: Property in public lands acquired from the government, as under the homestead laws; property acquired by adverse possession, borrowed money, and purchases on credit; accessions

and fixtures; damages resulting from personal injuries to a spouse; earnings of spouses and the investments thereof and the enhancement of investments; reinvestments; proceeds from life insurance; rents, issues, and profits of separate property, in some jurisdictions; etc. The chief notion concerning such acquisitions is, that they result mainly from the joint efforts of the spouses, while the marital relationship is sustained—the matrimonial gains." "The Ownership of Community Property," by Alvin E. Evans, 35 Harv. L. Rev. 47.

In the article from which the above paragraph is quoted, Professor Evans points out that there are eight states, viz. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, in which the community system is in effect. He also says: "As a matter of fact, there are four theories regarding the ownership of community property, and they differ essentially from each other in regard to the nature of the wife's interest. These theories are called, for convenience, the California or single ownership, the Washington or entity, the Idaho or double ownership, and the Texas or trust, theories, respectively." The learned author then discusses in detail the several theories.

See, also, the opinions of Mr. Justice Holmes, in Arnett v. Reade, 220 U. S. 311, 31 S. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040 (1911), and United States v. Robbins, 269 U. S. 315, 46 S. Ct. 148, 70 L. Ed. 285 (1926), on the practical effects of the different theories.

"The doctrine of the community of acquests and gains was unknown to the Roman law; and, although now common, we believe, to the greater number of the European nations, its origin cannot be satisfactorily traced. The best opinion appears to be that it took its rise with the Germans, among whom at a very early period of their history, the wife took, by positive law, the one-third of all the gains made during coverture. It is very probable that it was the real, or presumed, care and industry of the wife, which first produced this legislation; and, in an early state of society, the facts most probably fully justified such a rule. But, in this, as in many other instances, legislation survives long after the causes which occasioned it, have ceased to exist, and the nonexistence of these causes will not authorize courts of justice to refuse giving effect to the law. There are few, we believe, who think, at the present stage of society, that the wife contributes equally with the husband to the acquisition of property. If such cases exist, they are exceptions to the general rule. And yet, in this state, neither idleness, wasteful habits, nor moral or physical incapacity, would deprive the wife of an equal share in the acquests and gains; for our Code declares that every marriage, in Louisiana, superinduces of right, partnership, or community, in all acquisitions. Such, also, was the rule in Spain." Porter, J., in Cole's Widow v. His Executors (La.) 7 Mart. (N. S.) 41, 48, 18 Am. Dec. 241 (1828).

PART 4

MARRIAGE,[1] DIVORCE AND SEPARATION

CHAPTER 1

THE PROMISE TO MARRY AND THE BREACH THEREOF[2]

HOLCROFT v. DICKENSON.

Court of Common Pleas, 25 Car. II, 1672. Carter, 233.

An Action on the Case upon a Promise: The Plaintiff declares that the 10th of November, 21 Car. II, in consideration she did assume and promise to marry the Defendant within a Fortnight, the Defendant did assume and promise within a fortnight to marry her; and says, That this hindered her preferment to her damage of 100 Pounds: Verdict for the Plaintiff. Arrest of Judgment.

Argued by the Court seriatim.

Ellis, Justice. It hath been moved in Arrest of Judgment, that the Action lies not.

1. Here is no consideration, except Spiritual matter, and such whereof our Law can take no notice; there is not Quid pro quo.

2. It is such a Consideration which is not possible in the power of the Defendant to perform: For in this case, without another Act to be done (that is to say) by the Priest, there can be no Marriage at all. Several Cases Have been put, Coke 4. fo. 29. Buntings Case, the Conusance of the right of Marriage doth belong to the Ecclesiastical Court. 7 H. VI. fo. 1. One bargained that another should have his Daughter; there was not Quid pro quo, 45 Ed. III. 24. If a man Covenant by Deed to marry such an one, it is good; if without Deed, it is of Ecclesiastical Conusance. 14 Ed. IV. 6. If a man promise £20, in marriage with his Daughter, it is of Ecclesiastical Conusance. If a man promise a certain sum of Money to another to marry his Daughter, no Action lies at Common

[1] In 2 Pollock and Maitland's History of English Law, c. 7, § 1, there is a discussion of the ancient Germanic and early English law of marriage, and of the developments by which the jurisdiction over marriage came into the hands of the church and the church courts. The reading of this section would add much to the student's understanding of all of Part 4 of this book.

[2] For historical discussion, see Swinburne on Spousals, (especially at page 231, where the ecclesiastical and secular remedies are discussed); also, 157 Law T. 395 (1924).

Law: it is a cause of Matrimony, by Choke and Littleton, agreeing with the Master of the Rolls, 19 Ed. IV. 10. 20 Ed. IV. 3.

Notwithstanding the opinion of all these Books, I conceive the Action is well brought, and that Judgment ought to be given for the Plaintiff.

My Reason is, Here is a mutual Contract betwixt the parties about a lawful thing, and I hold it is not merely a Spiritual act. True, Ecclesiastical Courts have Conusance of it. If one pleads, Nient accouple en loyal Matrimony, they shall judge and bind us; but if he plead Nient sa feme, it shall be tried by Common Law. Anciently Marriage did not belong to the Ecclesiastical Court; not till the time of Pope Alexander the Third.

Selden will tell you what the rights of Marriage were originally, it was not a thing of Ecclesiastical Jurisdiction. If a Suit were in this Court concerning a Marriage to be executed in specie, we have nothing to do in it; when there is actus contra actum, Action will lye at Common Law. We bring not the Action to meddle with the Marriage, but for the Damages, that he hath not taken her according to his Promise. Fitzherbert N. B. 44. a. 120. K. Brook pl. 108. Action on the Case. Marriage is a consideration the Common Law takes notice of. If I covenant in consideration of Marriage, that I will stand seised, Ac. this will raise a good use, Plowd. 305. Fitzh. N. B. fo. 120. if one promise £20. to another to marry his Daughter, an action of Debt lies, Broke Debt. 107. Doctor & Stud fo. 104.

Later Authorities are full. Dyer 272. pl. 32. an action on the Case upon a promise of £20. made to the Plaintiff by the Defendant, in consideration the Plaintiff had taken to wife the Cozen of the Defendant, was good, with a special request laid.

I will give as much as I give with other my daughters; an Action on the Case lies against Executors, Crok Jac. Sanders and Esterby, Strecher and Parkers Case. after these times precedents are innumerable.

Therefore I hold Judgment pro Querente.

Atkins, Justice. I am for Judgment for the Plaintiff.

It hath been strongly objected, that here is nothing in the Case, but that is of meer Ecclesiastical Conusance. In the ancient Year-Books the matter is much disputed, yet the Year-Books are with some distinction, 45 Ed. 3. 24. If the Promise to marry be by Deed, then its triable at Common Law, otherwise not if without Deed. Fitzh. N. B. 120. 17 Ed. IV. 45. b. 9 Ed. IV. 10. 22 Ass. pl. 70. By which you may see the Ancient Books are not agreeable in this point, 14 Ed. IV. 6. there the distinction is more nice. If the Defendant promise £20. to marry his Daughter, it is determinable at Common Law; but if the Defendant promise £20. with his Daughter, this ought to be sued in the Spiritual Court, 20 Ed. IV. fo. 3. Nele was there of a different opinion, and gave the Case of Tithes.

Later Authorities are full.

Object. This entitling the Common Law Courts to Promises of Marriage was in troublesome times.

Resp. Stretcher and Parkers Case was before the troublesome times, 14 Car. I. 1 Rolls Abr. 22. Hill. 14 Jac. 1 Rolls Abr. fo. 14. pl. 3, 4. Sanders and Esterby. Trin. 10 Car. Chapmans Case. Pasch. 5 Car. Nortons Case. It is not for us to go contrariant to these Judgments; that which toucheth Matrimony, whether lawful or not lawful, ought to be tried in the Spiritual Court; but in our case the Spiritual Court cannot give remedy for damages.

Object. Its not a temporal Damage.

Resp. It is: Marriage to a woman especially, is an advancement or preferment, 4 Rep. Ann Davies Case. Loss of Matrimony is a temporal loss, Trin. 22 Jac. B. R. 1 Rolls Abr. 35. Tonsons Case, and innumerable Cases more. I hold Judgment ought to be for the Plaintiff.

WINDHAM, Justice, pro Querente.

An Action upon the Case upon a Promise for a Portion, this is not our Case properly; and the Cases cited are put where Marriage was consummated. In our Case there is no Marriage, no way whereby the ecclesiastical Court can be entitled to it. The Books speak much of the consideration of the Act being grounded upon Ecclesiastical matter, that therefore it ought to be questioned there; yet the Books all agree, that if there be a temporal matter doth interpose whereupon the Action is grounded, remedy may be had at the Common Law; a man may sue for one thing in the Ecclesiastical Court, and at Common Law; too. One sues for a pension properly in the Spiritual Court; yet if it be upon a Grant by the Parson and Patron, he may sue for it at the Common Law; that Case 45 Ed. III. 24. which puts the distinction of a Deed and no Deed, I cannot understand the difference. For one is as much a temporal act as the other is; the Cases are infinite, You will not find a Case as ours is, where the Marriage is not consummated. As our Case is, I think the Action will lye: here is a mutual Promise. Mutual Promises are good Considerations to support Actions upon the Case; in our Case there is mutual Promise, and a Promise of Marriage too, than which is no greater Consideration.

Object. Here is an act to be done by another, and perhaps the party may be within Age.

Resp. Within Age shall not be presumed. If I undertake to do an act, whereto a third person must concur, I must procure him to do it. And there may be a very great temporal loss: Ann Davies Case; the ground of the Action there was for losing her preferment, Hobart p. 10. Griesly and Lowther. Rolls 1 Abridg. fo. 19. Hutton p. 17. 1 Rolls Abr. fo. 22. Stretch and Parker. This is clear Authority, and the Reason is clear, and grounded upon a future Promise. I hold Judgment ought to be given for the Plaintiff.

Chief Justice VAUGHAN, pro Defendente.

Actions upon the Case have increased much since the Queen's time. Late Authorities in the troublesome times are of no moment. The Case of Stretch and Parker in Car 1. is but a single Judgment. No question there are many Ecclesiastical matters upon which may be temporal Contracts. Now I shall come to shew how this matter doth differ from the other Cases. I shall first look over the Record.

1. I except to the Declaration: She saith, In consideration she had promised to take him to Husband, within two weeks space he promised to Marry her: But when she comes to alledge the matter in fact, that she was parata & abtulit se &c but saith not infra duas septimanas, as the Promise is.

2. Except. When one is to do an act, and a third person is requisite to that act, if one would intitle himself to an Action, he ought expressly to shew the act was so offered to be done as it ought to be done, as with a Priest and other circumstances in our Case. It is not said, she tendered at the Church, nor when any Minister was by.

Now to the Point.

A Promise to take one to Husband absolutely, notwithstanding any impediment; this is not a good Promise, and the impediments of Marriage are to be judged in the Spiritual Court; and this Reason differs this Case from the rest. If a man call another Heretick, an Action lies not here, because if the Defendant justifie, this Court cannot judge of it: And so is our Case, if she promised to marry him absolutely, and an action brought against her here she cannot alledge an Impediment, as she might do in the Ecclesiastical Court, and Promise in Question must be necessarily intended, if there were no impediment; the Book of 14 Ed. IV. 6. this is expressly by way of contract and not as a Marriage portion. The Judgment was final, and they all said it was of Ecclesiastical Conusance, 45 Ed. III. fo. 24. Covenant to marry by Deed is good, without Deed its of Ecclesiastical Conusance, 22 Ass. pl. 7. Det. Br. 134. is a sudden opinion, Fitzherberts Opinion hath led many into a mistake, 44 Letter E. its founded upon this very Book of 22 Assise, he not taking notice of the difference of Deed, and Without Deed.

Now I shall put this as a single Case.

The promise made by Mary was expressly to take him to Husband before such a time; its nudum pactum, and no Consideration. I shall agree according to the common Case. If A. is bound to enfeoffe B. by such a day, and B. refuseth, and the bond is sued, its a good plea to say he was ready and offered, and he refused: If Mary had entered into Bond to marry him by such a day, and he had sued it, it had been a good plea in this case for her to say, She offered and he refused. In our Case it is otherwise; this case is void for want of recompence, for the performance of a thing promised; this hath nothing in it but a bare Pactum.

The next thing to difference it from other Cases is this: She shall

never have an Action unless she make it good on her part, and she can never make it good on her part as this Promise is; if she demand the recompence she doth perform her part; its necessary he perform his part, and then they are Man and Wife. No such act reciprocal is a good consideration in this case. One of full age marries one under age, she may dissent. In consideration you will promise to lye with me in the same Bed, I promise to lye in the same Bed with you. This is a parallel Promise, the performance of one part doth perform the other. In consideration you will hold my hand with yours, I will hold yours with mine. That which is supposed to be a Consideration, is a direct consequence; If you read a Deed in my hearing, I promise to hear it.

So for default in Pleading and other Reasons, I hold Judgment ought to be given for the Defendant.[3]

CORK v. BAKER.

Court of King's Bench, 1716 1 Strange, 34.

The plaintiff declares that, in consideration she promised to marry the defendant, he promised to marry her at his father's death, who is since dead, but the defendant refused so to do, and has since married A. B. which she lays to her damage £1,000, and upon non assumpsit obtained a verdict for £300.

The defendant moved in arrest of judgment, that this parol promise is not good in law. But after argument it was held that this is not within the Statute of Frauds and Perjuries, which relates only to contracts in consideration of marriage; and that the case in 3 Lev. 411, has been contradicted by later resolutions, Harrison v. Cage, 1 Ld. Raym. 386. Salk. 24. 5 Mod. 411, S. C. The defendant having married another person, has disabled himself to perform the promise, and therefore the plaintiff cannot apply to the spiritual court to have a performance decreed, but must be repaid in damages here.

Judicium pro querente.

[3] Accord: Baker v. Smith, Styles, 295 (1651); Holt v. Ward Clarencieux, 2 Strange, 937 (1732), supra, p. 131.

A woman may be sued for breach of promise of marriage. Harrison v. Cage, 5 Mod. 411 (1698).

See an article by J. Dundas White on "Breach of Promise of Marriage" in 10 Law Q. Rev. 135; also, Finlay v. Chirney, 20 Q. B. Div. 494 (1888).

MAD.D.R.

LEWIS v. TAPMAN.

Court of Appeals of Maryland, 1900. 90 Md. 294, 45 A. 459, 47 L. R. A. 385.

McSHERRY, C. J. This is a suit to recover damages for a breach of promise to marry. That there was an agreement, of some sort between the plaintiff and defendant to marry, is certain, but whether that agreement was absolute or conditional is one of the grounds of contention. It is insisted by the plaintiff that the defendant agreed to marry her within three years from a designated date; while, upon the other hand, it is alleged by the defendant that his promise was conditional, and that in no event was the promise set up by the plaintiff to be fulfilled until the expiration of three years from the time it was made. We need not, though it would be quite entertaining if we did, refer to the evidence bearing on these controverted issues of fact, and we need not refer to it, because the legal questions involved can be disposed of without quoting from the testimony. There is an inquiry suggested at the very threshold, and arising for the first time in Maryland, that may as well be considered and settled at once. Upon the assumption that the contract to marry was in fact made with a stipulation that it was not to be solemnized until after the expiration of three years, does it fall within that clause of the fourth section of the statute of frauds, which prohibits any action from being brought upon an agreement not to be performed within a year, unless the agreement be reduced to writing and be signed by the party to be charged therewith? This is the question which the rejected prayer interposed by the defendant, at the close of the case made by the plaintiff, and set forth in the ninth bill of exceptions, presents.

A contract to marry was treated at common law, so Blackstone states (Book 1, p. 433), "in no other light than as a civil contract"; but it is in reality something more. Questions relating to marriage were, from a very remote period, cognizable only in the ecclesiastical courts, which had no authority to award damages, but imposed censures, as was supposed, for the welfare of the soul. It is curious and interesting to trace the conflicts between these courts and the common-law courts, and, in a measure, the court of chancery, in the efforts of the last-named tribunals to expand their jurisdiction, and correspondingly to restrict that of the former, over these contracts. This expansion gradually grew until the last remnant of the ecclesiastical court's jurisdiction was swept away by 20 & 21 Vict. c. 85, except as to the granting of licenses. As the ecclesiastical courts formerly possessed sole authority in questions relating to marriage (this was conceded by Lord Chief Justice Vaughan, 1 Cart. 233), but as they had no power in cases of a breach of promise other than to decree a performance of the marriage (4 Bac. Abr. tit. "Marriage and Divorce," 530), which jurisdiction was taken away by 26 Geo.

2, c. 33, the common-law courts, after the adoption of the statute of frauds, in 1676, began to entertain civil actions for a breach of a contract per verba de futuro, and that jurisdiction, Lord Chief Justice Raymond observed in 1733, "was a point not to be disputed." Holt v. Clarencieux, 2 Strange, 937. After considerable discussion, it was finally adjudged that the two courts could not act concurrently, but that, if an appeal were had to the ecclesiastical court to compel a performance, the common-law courts could not hear a suit for damages, and so e converso. The suit at common law was at first greatly opposed, because the party had his remedy in the spiritual court. But, notwithstanding this, it was resolved the party had his election of either remedy, and that by bringing an action at common law the remedy in the spiritual court was waived and released; "for now," as remarked by Lord Chief Justice Holt, "in lieu of performance of the contract he shall recover damages." Collins v. Jessot, Holt, 458. In another particular there was with respect to such contracts flat contradiction in the early cases. Philpott v. Wallet, 3 Lev. 65, decided in the thirty-fourth year of the reign of Charles the Second, and five years after the statute of frauds had been adopted, was the first case which held that a promise to marry was within the other clause of the fourth section relating to contracts made in consideration of marriage. But this construction was departed from and overruled 11 years later, in Harrison v. Cage, 1 Ld. Raym. 386, and is no longer the law, either in England or in Maryland. Cork v. Baker, 1 Strange, 34; Ogden v. Ogden, 1 Bland. 284. In the reign of Charles the First, the court of chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract to marry (Toth. 124, as cited in 2 Camp. Lives Ld. Ch. p. 138), but it does not appear that the power was ever exercised.

These conflicts of jurisdiction, these variant decisions, serve to emphasize, what is otherwise perfectly apparent, that there has always been about the marriage contract that which renders it different from any other contract known to the law. A recent writer thus describes that difference: "It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true, to a certain extent, since the law always presumes two parties of competent understanding, who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound, they

are bound forever. Mutual consent, as in all contracts, brings them together, but mutual consent cannot part them. Death alone dissolves the tie, unless the legislature, in the exercise of a rightful authority, interposes, by general or special ordinance, to pronounce a solemn divorce." Schouler, Dom. Rel. § 13. And Mr. Justice Story, in his Conflict of Laws (section 108), though treating marriage as in its origin a contract of natural law, proceeds in note 3 to remark: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities, in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts."

So Fraser, while defining marriage as a contract, adds: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." 1 Fras. Dom. Rel. 87. A learned American writer (Bish. Mar. & Div. [6th Ed.] § 18) not only pronounces for this doctrine, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation. But this is not all. Prior to the adoption of our constitutional provision prohibiting the legislature from passing special laws granting divorces, it had been the custom of the general assembly to divorce, by statute, from the bonds of marriage, and this court held that such legislation could "be viewed in no other light than as regular exertions of legislative power." Crane v. Meginnis, 1 Gill & J. 474. What other contract can the legislature annul? Even the inhibition in the federal constitution, which denies to a state the power to pass any law impairing the obligation of a contract, does not prevent the dissolution of the marriage contract by an act of assembly. "It never has been understood," said Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 519, 4 L. Ed. 629, "to restrict the general right of the legislature to legislate on the subject of divorce." Marriage, holds the supreme court in a much later case, is not a contract, within the meaning of the prohibition in the federal constitution against the impairment of contracts by state legislation. Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

It is true that many of the observations just quoted from the text writers refer to the marriage relation or status, and it is also true that there is a distinction between the contract of marriage and a contract to marry. But the terms, "contract of marriage" and "contract to marry," are used to express the same idea, though, perhaps, it may not be strictly accurate to so use them. There is no reason for distinguishing "the contract of marriage," if by that term is meant the marriage relation, from all other contracts, that does not

equally apply to the contract to marry, which precedes and is a foundation of the consummated agreement. As the contract of marriage or the contract to marry, treating them as identical, is so essentially different from every other contract known to the law, it cannot be assumed that parliament, by the use of the words "any agreement," intended to include the contract to marry within the prohibition contained in the clause of the fourth section of the statute of frauds, which requires an agreement that is not to be performed within a year to be reduced to writing. As we have seen, no action was maintainable in the common-law courts on an agreement to marry when the statute was passed. Such an agreement was obviously not one of the contracts then contemplated by the lawmakers as being within the statute. The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract. The relation it has in view is wholly distinct from the relation which any other contract could contemplate. The capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement. It can only be made between a man and a woman. It has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it.

Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor, and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir Frederick Pollock observed in Hall v. Wright, El. Bl. & El. 793: "I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind, and is supported by no authority."

The fact that parties to a breach of promise suit could not testify until 32 & 33 Vict. c. 68, gave them the right to do so, in England, made it exceedingly improbable that a specific contract to marry at a time more than a year from the date of entering into the agreement could be proved at all, except in rare instances, particularly as the method of proving a contract to marry differs very materially from the mode of proving any other contract. The parliament knowing, as it must be presumed that it did know, that it had not been definitely settled, when the statute of frauds was passed, that a suit at common law could be brought for a breach of promise to marry, it is scarcely legitimate to infer that a contract to marry, the precise terms of which were rarely, if ever capable of exact proof, was designed to be included within the provision of the statute. Looking, then, to the nature of the contract to marry, to its origin, its antiquity, and its objects, and having regard to the early method of enforcing it in the spiritual courts, and considering how distinct

it is, in all the particulars we have indicated, from every other kind of contract which can be entered into, and bearing in mind that it is, as Lord Robertson, a distinguished Scottish judge, declared, "the very basis of the whole fabric of civilized society," we are unwilling to say that it falls, or was intended to fall, within the term "any agreement," as that term is used in the statute of frauds.

There were three American cases cited by the appellant's counsel in support of the contention that a contract to marry, if not to be performed within a year, is unenforceable under the statute. These were Derby v. Phelps, 2 N. H. 515; Nichols v. Weaver, 7 Kan. 373; Ullman v. Meyer (C. C.) 10 Fed. 241. On the other hand, we were referred by the appellee's counsel to Brick v. Gannar, 36 Hun, 52, and we have found Blackburn v. Mann, 85 Ill. 222, which sustain the opposite view. But no English case was called to our attention, and, after a diligent search, we have discovered none on either side of the question. In Blackburn v. Mann, supra, the court say: "Contracts of marriage, although defined as civil contracts, are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. Contracts of marriage, until a breach is shown that terminates them, may be regarded as continuing contracts by consent of the parties, and hence are, in no just sense, within the statute of frauds."

The cases relied on by the appellant turned upon the construction of the state statutes involved, which are not identical in phraseology with the statute of 29 Car. II. It is stated in 3 Pars. Cont. p. 3, that, although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied. But in Maryland the statute of 29 Car. II. is in force, not because there is any enactment transcribing it, but because of the provisions of article 5 of the declaration of rights, which declares that the inhabitants of Maryland are entitled to the benefit of such of the English statutes in force in the state on the 4th day of July, 1776, as have been found applicable to their local and other circumstances. In Ullman v. Meyer, supra, it was conceded by District Judge Wallace that, "as an original proposition, it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are," he went on to say, "agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them."

But, after all, "a contract not to be performed within a year, and specifically so agreed, is the only one within this clause." Dennison, C. J., in Fenton v. Emblers, 3 Burrows, 1278. There was evidence in the cause that the contract to marry was to be performed within

three years, and there was no evidence of a specific agreement that it should not be performed within a year. According to all the cases, if there was a possibility of its being performed within a year, and there was no stipulation that it should not be, then the contract would not be within the statute, even though it had relation to a subject-matter to which the statute was applicable. Cole v. Singerly, 60 Md. 348; Ellicott v. Peterson's Ex'rs, 4 Md. 476. * * *

For the reasons we have given, the judgment, which was for the plaintiff, will be affirmed. Judgment affirmed, with costs above and below.[4]

HUTTON v. MANSELL.

Court of King's Bench, 1795. 3 Salk. 16.

Case, etc., by a feme sole, in which she declared quod cum she had agreed and promised to marry the defendant, he, in consideration thereof, promised to marry her. Upon non assumpsit pleaded, the cause was tried before Holt, Chief Justice, and the promise of the man was proved, but no actual promise on the woman's side, yet he held there was sufficient evidence to prove that the woman likewise promised, because she carried herself as one consenting and approving the promise of the man.

WIGHTMAN v. COATES.

Supreme Judicial Court of Massachusetts, 1818. 15 Mass. 1, 8 Am. Dec. 77.

Assumpsit on a promise to marry the plaintiff, and a breach thereof by refusal, and having married another woman.

At the trial on the general issue, at the last November term before Parker, C. J., the evidence of a promise resulted from sundry letters written to the plaintiff by the defendant, and from his attentions to her for a considerable length of time.

It was objected by the defendant, that there being no direct evidence of an express promise, the action could not be maintained.

This objection was overruled by the judge; and the jury were instructed that if, from the letters of the defendant read in evidence, and the course of his conduct towards the plaintiff, they were satisfied that there was a mutual understanding and engagement be-

[4] In Derby v. Phelps, 2 N. H. 515 (1822), it was held that such a contract was governed by the section of the Statute of Frauds relating to agreements not to be performed within one year, but it was said that it was not governed by the section relating to agreements made upon consideration of marriage. On the second question, see Davis v. Cox, 178 Ind. 486, 99 N. E. 803 (1912). See 10 A. L. R. 332, for authorities on agreements in consideration of marriage.

tween the parties to marry each other, they might find for the plaintiff, which they did.

If the said direction was right, judgment was to be rendered on the verdict; otherwise a new trial was to be granted.

PARKER, C. J., delivered the opinion of the Court. Respectable counsel having expressed doubts upon the point reserved in this case, and having also suggested an opinion that the action was of a nature to be discountenanced rather than favored,[5] we have given more consideration to the case, than our impression of the merits of the objections would have required.

We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract, on the faithful performance of which the interest of all civilized countries so essentially depends. When two parties, of suitable age to contract, agree to pledge their faith to each other, and thus withdraw themselves from that intercourse with society which might probably lead to a similar connexion with another—the affections being so far interested as to render a subsequent engagement not probable or desirable—and one of the parties wantonly and capriciously refuses to execute the contract, which is thus commenced; the injury may be serious, and circumstances may often justify a claim of pecuniary indemnification.

When the female is the injured party, there is generally more reason for a resort to the laws, than when the man is the sufferer. Both have a right of action, but the jury will discriminate and apportion the damages according to the injury sustained. A deserted female, whose prospects in life may be materially affected by the treachery of the man, to whom she has plighted her vows, will always receive from a jury the attention which her situation requires; and it is not disreputable for one, who may have to mourn for years over lost prospects and broken vows, to seek such compensation as the laws can give her. It is also for the public interest, that conduct tending to consign a virtuous woman to celibacy, should meet with that punishment, which may prevent it from becoming common. That delicacy of the sex, which happily in this country gives the man so much advantage over the woman, in the intercourse which leads to matrimonial engagements, requires for its protection and continuance the aid of the laws. When it shall be abused by the injustice of those who would take advantage of it, moral justice as well as public policy dictate the propriety of a legal indemnity.

This is not a new doctrine. As early as the time of Lord Holt, it was enforced, as the common law, by that wise and learned judge and his brethren, that a breach of promise of marriage was a meritorious cause of action. 3 Salk. 16, Hutton v. Mansell. 2 Comyns

[5] See, also, the language of Mansfield, C. J., in Lowe v. Peers, 4 Burr. 2225 (1768), and of Swinfen Eady, L. J., in Quirk v. Thomas, [1916] 1 K. B. 516, at page 527. See note, 7 Harv. L. Rev. 372.

on Contracts, 408. And although the value of a marriage in money might have had some influence in that decision, there is no doubt that the loss sustained in other respects,—the wounded spirit, the unmerited disgrace, and the probable solitude, which would be the consequences of desertion after a long courtship,—were considered to be as legitimate claims for pecuniary compensation, as the loss of reputation by slander, or the wounded pride in slight assaults and batteries.

Nor is this English law become obsolete. It is the common law of our country, always recognized when occasions have offered; and the occasions have not been unfrequent since the adoption of our constitution. 3 Mass. 189, 3 Am. Dec. 122, Boynton v. Kellogg. In the case of Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95, Chief Justice Parsons says: "As the law now stands, damages are recoverable for a breach of promise of marriage."

Several actions of this nature have been before this court, since I have been upon the bench, and I remember several when I was in practice at the bar, in which I was counsel. Indeed there is no country, in which the relative situation of the sexes, and their joint influence on society, would render such a principle of jurisprudence more useful or necessary.

As to the technical ground, upon which the objection to the verdict now rests, we entertain no doubts. The exception taken is, that there was no direct evidence of an express promise of marriage made by the defendant. The objection implies that there was indirect evidence, from which such a promise may have been inferred; and the jury were instructed that if, from the letters written by the defendant as well as his conduct, they believed that a mutual engagement subsisted between the parties, they ought to find for the plaintiff. They made the inference, and without doubt it was justly drawn.

Is it then necessary, that an express promise in direct terms should be proved? A necessity for this would imply a state of public manners by no means desirable. That young persons of different sexes, instead of having their mutual engagements inferred from a course of devoted attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they considered themselves bound, to call witnesses, or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse, which is the pride of our country; and a boldness of manners would probably succeed, by no means friendly to the character of the sex, or the interests of society.

A mutual engagement must be proved, to support this action: but it may be proved by those circumstances, which usually accompany such a connexion. No case has been cited, in support of the defendant's objection. On the contrary, it is very clear from all the English cases, that a promise may be inferred, and that direct proof is not necessary. In the case before referred to of Hutton v. Mansell,

Lord Holt says expressly, that where one has promised, and the behavior of the other is such as to countenance the belief that an engagement has taken place, this is evidence enough of a promise on the part of the person so conducting; and the same principle will apply to both the parties.

In the present case, however, the evidence on which the jury relied, was of a decisive nature; for the letters of the defendant, which were submitted to them, were couched in terms which admit only of the alternative, that he was bound in honor and conscience to marry the plaintiff, or that he was prosecuting a deeply laid scheme of fraud and deception, with a view to seduction. The jury believed the former, and in so doing, have vindicated his character from the greater stain; and he ought to be content with the damages, which they thought it reasonable to assess for the lighter injury.

Judgment on the verdict.[6]

WILD v. HARRIS.

Court of Common Pleas, 1849. 7 C. B. 999.

Assumpsit for a breach of promise of marriage. * * * At the trial, before Maule, J., at the sittings in Middlesex, after the last Hilary term, a verdict was found for the plaintiff, damages £10.

WILDE, C. J. This was a motion in arrest of judgment. The action was for a breach of promise of marriage; and the declaration

[6] In Daniel v. Bowles, 2 C. & P. 553 (1826), defendant declared his love for plaintiff in the presence of plaintiff's mother, obtained the mother's consent, and made some arrangements for the marriage. Plaintiff said nothing, but continued to receive defendant's visits in the capacity of a suitor. Best, C. J., said: "I think that her being present, and not making any objection, coupled with what happened afterwards, shews that she consented, and would be sufficient to enable the defendant to maintain an action against her. It would be indelicate to expect that she should consent in words. No doubt the jury must be satisfied that there were mutual promises; but I think there is evidence from which they may be inferred." Plaintiff received a verdict for £1,500.

In Homan v. Earle, 53 N. Y. 267 (1873), Church, C. J., said: "Contracts of marriage are unlike all others. They concern the highest interests of human life, and enlist the tenderest sympathies of the human heart, and the acts and declarations done and employed by parties in negotiating them are often correspondingly delicate and emotional. As matter of law, the learned judge was clearly right in holding that no formal language is necessary to constitute the contract of marriage. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they have arrived at that state. The authorities both in this country and England establish this doctrine. Hutton v. Mansell, 6 Mod. 172 [1794]; Hickey v. Campion, 20 Weekly R. 752 [1872]; [Southard v. Rexford] 6 Cow. [N. Y.] 254 (1826); [Wells v. Padgett] 8 Barb. [N. Y.] 323 [1850]; [Hotchkins v. Hodge] 38 Barb. 117 [1862]; [Hoitt v. Moulton] 21 N. H. 586 [1850]; [Kniffen v. McConnell] 30 N. Y. 285 [1864]; 5 Wils. & Shaw, 144; [Honyman v. Campbell] 2 Dow. & Clark, 282 [1831]."

The woman's uncorroborated testimony may be sufficient. Thompson v. Scott, 34 N. D. 503, 159 N. W. 21 (1916); Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132 (1908).

stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, promised to marry him within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; it then went on to aver, that the plaintiff remained sole and unmarried, and had always been ready and willing to marry the defendant, but that the defendant disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise. On behalf of the defendant, it has been contended, that, inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise,—so that the plaintiff was not bound by her promise to marry the defendant,—there was a total absence of consideration.

But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time,—which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do: and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time, was not absolutely impossible of performance; for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff. The authority referred to by my Brother Cresswell in the course of the argument,—from Brooke's Abridgment,[7] seems to recognise the principle which must govern this case. There, a woman infeoffed a man, upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married; whereupon the original feoffor entered as for condition broken; and it was held that it was a lawful condition; for, that the feoffee's wife might have died within a reasonable time. It would be strange indeed, to allow the defendant to rely upon his own wrong,—to set up his fraudulent concealment of his marriage,—in order to discharge himself from his promise; the plaintiff having performed her part of the consideration, by remaining unmarried, and ready to marry the defendant, until she discovered that he was already a married man. We therefore think there is no ground for the application.

Rule refused.[8]

[7] Brookes Abr., title "Conditions," p. 119, Lib. Assisarum, 40 Edw. III, pl. 13, Fitzh. Nat. Brev. p. 205 H.

[8] "The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party. The damages to the plaintiff are certainly not diminished by the consideration that the promise was made under such circumstances. The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion that, even if the future performance here is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying

WILSON v. CARNLEY.

King's Bench Division, 1907. 23 Times Law Rep. 578.

This was the argument of a point of law raised on the pleadings in an action for damages for alleged breach of promise of marriage. The statement of claim alleged that the defendant verbally promised on June 19, 1894, to marry the plaintiff upon the death of the defendant's wife, who was then living, and that the promise was verbally ratified and renewed by the defendant at Easter, 1897, and that in January, 1906, the defendant's wife died, but that the defendant refused to marry the plaintiff. The defendant denied the alleged promise and the alleged ratification or renewal. He further pleaded that the alleged promise and renewal and ratification were contrary to public policy and good manners, and were illegal and void, and in the alternative that the plaintiff had released and discharged him from the alleged promise, and that the plaintiff had conducted herself in a manner inconsistent with the maintenance of any engagement by publishing libels of the defendant.

Mr. Justice CHANNELL, in giving judgment, said that there was really no authority upon the point. The statement of Chief Baron Pollock was apparently not agreed to by Baron Parke, and was only a dictum, as it was not necessary for the decision of the case. As against that there was some ancient and not very intelligible authority, which Chief Baron Pollock seemed to have thought was against

for any time on the promise affords sufficient consideration to support the defendant's contract. [2 Parsons on Contracts (5th Ed.) 67; Wild v. Harris, 7 C. B. 999 [1849]." Colt, J., in Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871).

The great weight of authority is in accord. See 47 A. L. R. 400, for references.

Cf. the following language of Pollock, C. B., in Millward v. Littlewood, 5 Exch. 775 (1850), used in reference to the principal case: "Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection, which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good."

As to the effect of the plaintiff's not repudiating the engagement after learning that the defendant was already married, see Coover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706 (1870).

The action may be in tort for deceit, Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1881). See, also, Morrill v. Palmer, 68 Vt. 1, 33 A. 829, 33 L. R. A. 411 (1895), where the defendant married plaintiff, who was ignorant of the existing marriage, and tort for deceit was allowed.

When the plaintiff knew that the defendant was living with another woman, who was in fact his wife, although he represented to plaintiff that she was not, she cannot recover. Davis v. Pryor, 112 F. 274, 50 C. C. A. 579 (1901), reversing 3 Ind. Terr. 396, 58 S. W. 660 (1900).

his view, and which Baron Parke certainly thought was against the view of the Chief Baron. He had no doubt that the reason why there was no authority was that in practice such a question never arose in the abstract form in which it was now before him, because when such promises were in fact made they were generally accompanied by immorality, and were not binding. He had to decide whether a promise by a married man to marry another woman on the death of his wife, the woman to whom he made the promise necessarily knowing that he was a married man was, as an abstract proposition, contrary to public policy.

Assuming that the ground of such promise being said to be contrary to public policy was that it was inconsistent with the affection which ought to exist between a husband and wife, he thought that was not necessarily so, as for example in the case of a man's wife being in a lunatic asylum or in a case where a man's wife asked him in the event of her death to marry a particular person. It is impossible to lay down the abstract proposition that such a promise as the one now in question was necessarily void as being contrary to public policy; and it was not desirable at the present day to introduce new grounds of illegality of that kind, for it had been frequently held that the doctrine of illegality on grounds of public policy should not be extended. On the whole he was not prepared to decide this point of law in favour of the defendant so as to stop the action, as it was impossible to say, as an abstract proposition, that the promise was invalid or illegal. The case must, therefore, go for trial.[9]

[9] See judgment of Lord Coleridge accord, in same case after trial, in Wilson v. Carnley, 23 Law T. (K. B. Div.) 757 (1907).

Compare Spiers v. Hunt, 24 Law T. (K. B. Div.) 183 (1907), contra. In this case Phillimore, J., said: "My Brother Channell, in Wilson v. Carnley, supra, thought that there might be cases in which there would be no mischievous tendency, or not so much mischief, and he instanced cases in which the other consort was an incurable lunatic, or the promise was made at the deathbed and upon the request of the dying consort, and therefore he declined to decide as a matter of law that such a promise could never be enforced. I have not to deal with such cases, and my decision does not necessarily cover them; it may be that the rule is general, but not universal. Where there is confirmed lunacy there may be no injury to the lunatic consort, but there remains the objection of probable sexual immorality. In the other case, if the consort be indeed on a deathbed, there is no palpable danger; but as Chief Justice Best said, when it was attempted for other purposes to insist upon approaching death as creating a peculiar legal position, it would be difficult to establish a rule which would settle the degree of approaching death, and more difficult to ascertain by evidence when the case was within that degree."

The principal case was overruled, and Spiers v. Hunt, supra, approved, in Wilson v. Carnley (Court of Appeals) 24 Law T. 277 (1908). See, also, note criticising principal case in 21 Harv. L. Rev. 58.

NOICE v. BROWN.

Supreme Court of New Jersey, 1875. 38 N. J. Law, 228, 20 Am. Rep. 388.[10]

On demurrer to the declaration.

Argued at November Term, 1875, before BEASLEY, Chief Justice, and Justices DEPUE and VAN SYCKEL. The opinion of the Court was delivered by

BEASLEY, Chief Justice. The declaration, to which a demurrer has been filed, complains in all its counts of a breach of a promise of marriage. The counts are special, and all contain the same facts. The case thus presented is, that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained.

I can not see the faintest semblance of legality in the promise here laid. It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws. But this relationship, in order to execute the purpose for which it is established, requires the undivided devotion of each of the parties to it to the other, and the consequence is that it is invaded and impaired by anything which has a tendency to alienate such devotion. But this plaintiff claims the right to take to herself that affection of this husband, which, in legal theory at least, belongs to the wife; but such a transfer the law will not sanction. Such conduct is a gross violation of the rights of the wife. Nor, in a legal point of view, does it at all strengthen the argument to suggest that the defendant, at the time of making this promise, was living separated from his wife, and was looking forward to a divorce. While the marriage exists the duties inherent in such marriage likewise exist, and they cannot be thrown off at the will of either party. By voluntarily withdrawing from the society of his wife a man cannot free himself from his matrimonial obligations. Nor can he do so in the hope of a divorce. If a husband can bind himself to a future marriage conditioned on the getting of a divorce, so he can incur a similar obligation to be put in effect on the dissolution of his marriage

[10] Affirmed 39 N. J. Law, 133, 23 Am. Rep. 213 (1876).

by the death of his wife. Such contracts are highly impolitic and highly scandalous, and are, therefore, illegal.

The demurrer must be sustained.[11]

HANKS v. NAGLEE.

Supreme Court of California, 1879. 54 Cal. 51, 35 Am. Rep. 67.

Appeal from a judgment for the plaintiff, and from an order denying a new trial, in the Twentieth District Court, County of Santa Clara. Belden, J.

The facts are stated in the opinion.

BY THE COURT: This is an action for a breach of promise of marriage. The alleged promise is denied by the answer. The plaintiff was examined as a witness in her own behalf, and testified in substance that the agreement between the parties was, that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterward marry her. "He promised me that if I should give up myself to him, that he should marry me."

"Q. What did you say to that?"

"A. At first I refused; at last I, of course, gave myself up to him."

First. Upon well settled principles the plaintiff should not have recovered upon a contract of this character. As being a contract for illicit cohabitation, it is tainted with immorality. Story on Cont. § 458; Steinfeld v. Levy, 16 Abb. Prac. N. S. (N. Y.) 26, and other authorities cited in appellant's brief.

Second. But this question was not made below, nor is the record here in such a condition as would, under the settled rules of practice, permit us to determine the case upon this point.

Third. But the Court below, in stating to the jury "the elements of injury which go to make up the sum total of damage" which the

11 See notes cited in note 8, supra.

If, after divorce, but within the period during which remarriage is forbidden, a promise is made to marry after the expiration of such period, the promise is enforceable. Morgan v. Muench, 181 Iowa, 719, 156 N. W. 819 (1916). But see Vnuk v. Patterson, 118 Or. 602, 247 P. 766, 47 A. L. R. 394 (1926).

A promise made by a divorced person who is legally free to remarry, to marry after the death of his divorced wife, is enforceable. Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900).

An absolute impediment to a valid marriage, such as impotency on the part of the promisor, if known to the promisee, renders the promise void. Gulick v. Gulick, 41 N. J. Law, 13 (1879).

A bond with a penalty for breach of an engagement is valid. Atkins v. Farr, 1 Atk. 287 (1738). But an agreement to pay a penalty upon marrying any one other than the obligee, but not promising to marry her, is void as in restraint of marriage. Lowe v. Peers, 4 Burr. 2225 (1768); Conrad v. Williams, 6 Hill (N. Y.) 444 (1844), semble. See, also, McCoy v. Flynn, 169 Iowa, 622, 151 N. W. 465, L. R. A. 1915D, 1064 (1915).

plaintiff might be considered to have sustained, instructed them as follows: "Next, if * * * the defendant, taking advantage of the promise under which she (the plaintiff) was acting, has had illicit relations, and has seduced the plaintiff, that is another element proper for the jury to consider," etc. But the evidence which we have just detailed, coming as it did from the mouth of the plaintiff herself, shows that this case is not one of the character assumed by the Court as the basis for this instruction. It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of a female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage. It is clear, therefore, that the hypothesis upon which this instruction was based could not be assumed by the jury for the purpose of fixing the amount of damages the plaintiff was to recover.

Judgment and order denying a new trial reversed, and cause remanded for a new trial. Remittitur forthwith.[12]

BAKER v. CARTWRIGHT.

Court of Common Pleas, 1861. 10 C. B. (N. S.) 124.

The declaration stated that the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed, and the plaintiff had always been ready and willing to marry the defendant; yet the defendant had neglected and refused to marry the plaintiff; and the plaintiff claimed £500.

The defendant pleaded—first, that he did not promise and agree as alleged; secondly, a denial of the breach of contract alleged; thirdly, that he entered into the said agreement in the declaration mentioned upon the faith and under the belief that the plaintiff had been and was of sound mind, and had never been afflicted with insanity, and had never been legally confined as a lunatic in a lunatic asylum, whereas the plaintiff, before the making of the said agreement, had been and was of unsound mind, and had been legally

[12] Accord: Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283, 24 Ky. Law Rep. 2467 (1903); Gagush v. Hoeft, 198 Mich. 263, 164 N. W. 400 (1917); Goodall v. Thurman, 1 Head (Tenn.) 209 (1858).

Sexual intercourse which follows a promise to marry does not vitiate it, and the seduction will be considered in measuring the damages. Thorn v. Tetrick, 93 W. Va. 455, 116 S. E. 762 (1923). See, also, p. 541, infra. But see, on the question of damages for the seduction, Wrynn v. Downey, 27 R. I. 454,

confined as a lunatic in a lunatic asylum, which the defendant first discovered after making the said alleged agreement and before the alleged breach thereof, wherefore the defendant then refused to marry the plaintiff, which was the alleged breach.

The plaintiff joined issue on the above pleas; and, for a second replication to the third plea, said that the unsoundness of mind therein mentioned existed only for a short time, to wit, four months, and that after she had been confined in the lunatic asylum as in that plea mentioned, and before the making of the said agreement, she the plaintiff became and was and from thence hitherto had been of sound mind, and had been and was legally discharged from the said lunatic asylum.

She also demurred to the third plea, the ground of demurrer stated in the margin being, "that the fact of the plaintiff having been legally in a lunatic asylum is no justification for the breach of the defendant's promise." Joinder.

The defendant demurred to the second replication to the third plea, the ground of demurrer stated in the margin being, "that the replication confesses the allegations in the defendant's plea, and it is no sufficient ground of reply, that, before the agreement, the plaintiff became of sound mind, and was legally discharged from the lunatic asylum." Joinder.

Macnamara, for the plaintiff.

Overend, Q. C. (with whom was Daly), contra. The object of this sort of contract is as well to acquire the close intimacy of a companion for life as the lawful propagation of the species. This object would evidently be not only entirely frustrated, but would probably entail mischief on the community by perpetuating hereditary disease of the most painful character, if such a defense as this were not allowable. A person afflicted with such a malady,—a recurrence of which is always to be apprehended,—can never be fit properly to discharge the duties of a wife and a mother. There can be no good reason why sanity should not be as much an implied exception in such a contract as chastity.

EARLE, C. J. The general doctrine laid down by the Exchequer Chamber, in the case referred to,[13] is, that the contract binds, and that want of chastity is the only exception.[14] That being so, I think

63 A. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912 (1906). Nor does the fact that sexual intercourse precedes the promise vitiate it. Klitzke v. Davis, 172 Wis. 425, 179 N. W. 586 (1920).

[13] The case referred to is Beachy v. Brown, 1 El., Bl. & El. 796 (1860), where it was held that the plaintiff's previous engagement to a third person was no defense. Accord: Doubet v. Kirkman, 15 Ill. App. 622 (1884), semble; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314 (1853).

[14] Unchastity of the plaintiff before the promise and unknown to the defendant is a defense. Foster v. Hanchett, 68 Vt. 319, 35 A. 316, 54 Am. St. Rep. 886 (1896). See, also, Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124

we are bound to hold that the third plea of the defendant in this case affords no answer, and consequently there must be judgment for the plaintiff.

WILLIAMS, J. I am entirely of the same opinion. No fraud is alleged.

The rest of the court concurring.

Judgment for the plaintiff.

MORTON, J., in VAN HOUTEN v. MORSE (Supreme Judicial Court of Massachusetts, 1894) 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373: "The jury were correctly instructed that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life, and that the parties would be bound, if they became engaged without making any investigations, and without receiving any assurance or representations which led to the engagement, even though matters were discovered subsequently, which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery. Whether the only matters which would give the defendant such a right were those relating to the chastity of the plaintiff, we have no need now to consider. * * * And later they were told that the defendant was not bound if the contract was procured by deception or by fraud, or by concealment which was fraud, but that there was no fraudulent concealment by simply not communicating information, that a promise would be valid, though made in complete ignorance of the antecedents of the parties, but that there was a different doctrine where matters were inquired about, and that, if either party made inquiries of the other with reference to family, position, or circumstances in the life or experience of the other, then, if willful false statements were made with reference to any of those things which might fairly be considered as entering into the judgment of either party as to whether that party would or would not enter into a contract of marriage, then there would be a false representation. 'That is,' the court continued, 'a statement which the party knows is false, or makes as true of his or her own knowledge, when it is in fact untrue, and without knowing that it is

Am. St. Rep. 561 (1907). But see, for a judicial expression to the contrary, the dissenting opinion of Beck, J. A., in G. v. B., 1 W. W. R. 324 (1926).

Unchastity after the promise is a defense. Colburn v. Marble, supra; Garmong v. Henderson, 115 Me. 422, 99 A. 177 (1916).

The authorities are in conflict as to whether the plaintiff's bad reputation for chastity is a defense. See Foulkes v. Sellway, 3 Esp. 236 (1819); Welker v. Metcalf, 209 Pa. 373, 58 A. 687 (1904); Colburn v. Marble, supra; and Foster v. Hanchett, 68 Vt. 319, 35 A. 316, 54 Am. St. Rep. 886 (1896). See, also, p. 541, infra.

As to the requirement of chastity, the law is impartial as between the sexes. See McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960 (1911).

true, or if there is concealment of any such particular which is inquired about, those circumstances will be sufficient to make void a contract entered into in consequence and relying upon them, unless they are of such a nature that no man would be justified in the exercise of any reasonable care in relying upon these statements.' These instructions might, and probably would lead the jury to infer that concealment on the part of the plaintiff would not constitute fraud, except as to matters that were inquired about by the defendant. But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and if she willfully concealed and suppressed such facts and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. Kidney v. Stoddard, 7 Metc. 252; Short v. Currier, 153 Mass. 182, 26 N. E. 444; Burns v. Dockray, 156 Mass. 135, 137, 30 N. E. 551; Prentiss v. Russ, 16 Me. 30; Atwood v. Chapman, 68 Me. 38, 40, 41, 28 Am. Rep. 5; Potts v. Chapin, 133 Mass. 276; Clark v. Baird, 9 N. Y. 183; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Devoe v. Brandt, 53 N. Y. 462; Hill v. Gray, 1 Stark. 434; Stevens v. Adamson, 2 Stark. 422; Arkwright v. Newbold, 17 Ch. D. 301, 317, 318; Aortson v. Ridgway, 18 Ill. 23; Add. Torts (Wood's Edition) 1205. Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters, which would have prevented the engagement if known, would not constitute fraud on her part. Potts v. Chapin, ubi supra. But a partial and fragmentary disclosure, accompanied by the willful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation. Arkwright v. Newbold, ubi supra."

for defense

SHEPLER v. CHAMBERLAIN.

Supreme Court of Michigan, 1924. 226 Mich. 112, 197 N. W. 372, 33 A. L. R. 1232.

Suit by Bessie Shepler against George W. Chamberlain. Judgment for plaintiff, and defendant brings error. Affirmed.

FELLOWS, J. Plaintiff had verdict and judgment in the sum of $4,000 in this action brought by her for breach of promise of marriage. If the testimony offered by plaintiff including her own is to be believed, and the jury believed it, the engagement was entered into in the fall of 1916, and continued until the fall of 1922, when it was breached by de-

fendant. Agreements to marry are not usually entered into under circumstances similar to those of commercial contracts, nor are their breaches usually so circumstanced. We shall not discuss the evidence in detail, and will content ourselves with saying that there was sufficient evidence given in behalf of plaintiff to take to the jury the question of the mutual promise to marry—of the agreement—and the breach thereof by defendant. At the trial there was no motion made by defendant for a directed verdict for failure of proof as to either of these branches of the case. We may also say that we find no reversible error in the rulings of the trial judge in receiving and rejecting testimony.

This brings us directly to the important and interesting question in the case. Particularly important because the public is one of the parties to the marriage contract itself, and the question involved is one of public policy. Some time after the engagement which the jury found established, defendant became afflicted with a cancer on his lower lip. He consulted his physician at that time, and his physician advised treatment which he did not follow. All of the medical evidence in the record was introduced by defendant. It tends to establish that defendant now is afflicted with a cancer; it tends to establish that it is now curable, and was readily curable when first discovered; it tends to establish that the pus discharged from it is infectious as is other pus, but it negatives the claim that cancer is a communicable disease. The tendency of the medical testimony is that it is not a hereditary disease, and there is no testimony that defendant's physical condition due to the cancer will in any way be aggravated or affected by the marital relations, or that his death would be hastened by consummation of the marriage.

The right of a defendant to breach a contract to marry on the ground of his own health has not been fully considered by this court. The right of a defendant to show the physical condition of the plaintiff in an action of this kind is established by Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242, but that case involved the right of one of the contracting parties to insist that the other party to such a contract should bring to the marriage a good state of health; in other words, that the husband is entitled to a healthy woman for a wife rather than an invalid. Some language used in the case of Simmons v. Simmons, 8 Mich. 318, might have some application here if we did not have in mind the question of public policy. At the time that case was written cousins were not inhibited from marrying, and it was held that proof of the frequent intermarriage of the ancestors of the parties who were cousins resulting in unfortunate issue was not admissible, the breach not having been placed on that ground, and it was said:

"A change of health, or any other essential change in condition, may be in some cases a complete bar to an action of this kind; and so may the recent discovery of facts be a bar, or a cause for mitigation of damages, if the party acts upon it in good faith in receding from his con-

tract. But a ground such as is here taken is of no weight whatever, when it is not shown to have been the real and honest cause of the breach of engagement."

In the instant case by the pleadings the defense is raised, and, although defendant in his testimony denies any agreement to marry was entered into, we do not think the defense should be ignored as insisted by plaintiff's counsel. The question involved concerns the public as well as the parties, and is properly before us for consideration.

In considering this question we should begin with the case of Hall v. Wright, 96 Eng. C. L. 745. In this case the defense was placed on the ground that after the promise defendant became afflicted with a disease resulting in hemorrhage of the lungs, rendering him incapable of marriage without great danger to his life. In the Court of Queen's Bench (page 746) the judges were evenly divided. Crompton, being the junior judge, withdrew his opinion, and the judgment went for the defendant. In the Exchequor Chamber on appeal (page 765) the case was reversed by a vote of four to three, each of their lordships, as is common, expressing his views in a separate opinion. This case has received much adverse criticism in this country by courts and text-writers, and Pollock, the eminent English writer, in his work on Contracts (Pollock on Contracts [8th Ed.] 449), reviews the case, and concludes:

"The decision itself can be reviewed only by a court of ultimate appeal; but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided."

Reference is made in several of the opinions in the Hall Case to the case of Atchinson v. Baker, 2 Peake's N. P. 103, where it was said by Lord Kenyon:

"* * * If the condition of the parties was changed after the time of making the contract, it was a good cause for either party to break off the connection. Lord Mansfield had held that if, after a man had made a contract of marriage, the woman's character turned out to be different from what he had reason to think it was, he might refuse to marry her without being liable to an action, and whether the infirmity was bodily or mental, the reason was the same; it would be most mischievous to compel parties to marry who could never live happily together."

But this was manifestly dictum, as the case was disposed of on a question of pleadings.

We have noted the fact that Hall v. Wright, supra, has been criticized by some of the courts of this country. It has, however, been approved by the Court of Appeals of New Jersey. Smith v. Compton, 67 N. J. Law, 548, 52 A. 386, 58 L. R. A. 480. But in following it the court was led to the adoption, as we view it, of an extreme doctrine, and it was there held (we quote from the syllabus):

"Nothing will excuse the defendant for the breach of promise of marriage except such a disease or complication of diseases as renders the

making of the marriage contract and the consummation of the marriage by marital intercourse impossible."

We think this doctrine ought not to be followed. It places agreements to marry on the basis of commercial dealings, and loses sight of the fact that the public is interested, and that healthy offspring of every marriage is not only in furtherance of the marital relations but of benefit to the state.

In the case of Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. Rep. 166, the defendant had at one time been afflicted with syphilis. He was advised by his physician that he was cured, and in fit condition to marry. Believing such advice and in good faith he became engaged to plaintiff. Thereafter, and without fault on his part, the disease again developed, and he declined to carry out the agreement to marry. His defense was sustained, and it was said by the court:

"It is not pretended, nor has it been so adjudged, in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract, after it has been entered into, and without his fault, as would render him less capable of discharging duties growing out of the marital relation, would be sufficient to justify its breach; but when the party is afflicted with bodily disease to such an extent as is dangerous to the lives of those with whom he comes in contact, and such as must, if he should marry, necessarily be communicated to his wife by sexual intercourse, and, through her, to affect her offspring with the poison, connected with the fact he was ignorant of the disease being upon him at the time he contracts to marry, he will be excused for the nonperformance of his undertaking."

A similar Kentucky case is Gardner v. Arnett, 50 S. W. 840, where it was said by the court:

"If the syphilis developed after he had made the contract of marriage, his right to refuse to carry it out existed. He owed it to the plaintiff and society to refuse to enter into marriage relations with her, and he had the right to abandon the contract and refuse to marry her at any time before their marriage was solemnized."

So in Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444, defendant was advised by his physician that he was suffering from a loathsome venereal disease which was incurable. He at once notified plaintiff's parents. It was claimed that he was convinced of the correctness of the advice of his physician, and it was said by the court:

"In his answer he alleged that his failure to comply really depended upon such a conviction on his part, and, if such be true, this court could not hold that he was responsible in damages by reason thereof. We cannot understand how one can be liable for not fulfilling a contract when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself."

Both Kentucky and North Carolina courts repudiate the doctrine of Hall v. Wright, supra.

Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581, was an action for breach of promise. The defense was that after the engagement defendant became afflicted with a disease of the urinary organs which would be aggravated by sustaining marital relations. While we think the case correctly decided, it is doubtful if we could go as far in laying down a general rule as did the Virginia court. It was there said:

"We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable."

The disease might be of only a temporary character which would readily yield to treatment. This might justify request for the postponement of the marriage until defendant might be cured, but would not justify the breach of the agreement. This is pointed out in Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302, where defendant was afflicted with a venereal disease of a temporary character, and it was there said:

"If the disease is of a temporary character, such as was the case here, and could be easily cured, the defendant is entitled to postpone the marriage until he is cured, and if the disease is of a permanent character, such as was the fact in the North Carolina, Kentucky, and Virginia cases cited, the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so."

These cases, with the exception of the Virginia case, hold that, where defendant without his fault after the engagement develops an incurable, communicable disease which affects his ability to perform his marital duty, or which renders marital relations impossible without communicating the disease to his spouse or their offspring, such fact operates as a justification of the breach of the agreement to marry.

Travis v. Schnebly, 68 Wash. 1, 122 P. 316, 40 L. R. A. (N. S.) 585, Ann. Cas. 1913E, 914, is similar to our case of Goddard v. Westcott, supra, and somewhat similar is Gring v. Lerch, 112 Pa. 244, 3 A. 841, 56 Am. Rep. 314, where it is tersely stated:

"A man does not court and marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return, and if the woman with whom he contracts be incapable by reason of a natural impediment of giving him the comfort and satisfaction to which as a married man he would be entitled, there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach."

In Grover v. Zook, 44 Wash. 489, 87 P. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192, the plaintiff was afflicted with pulmonary tuberculosis, and defendant had a hereditary taint of such disease. It was held that such facts justified the breach of the agreement, even though both parties were aware of the facts before

the engagement. We do not cite this case with approval of all that the opinion contains, but it is authority to the point that the question of public policy is involved in cases of this character.

The Supreme Court of Iowa, in the case of In re Estate of Oldfield, Bowie v. Trowbridge, 175 Iowa, 118, 156 N. W. 977, L. R. A. 1916D, 1260, Ann. Cas. 1917D, 1067, in both the prevailing opinion written by Justice Gaynor and the dissenting opinion written by Justice Salinger, fully considers and discusses the authorities upon the subject. We commend that case to those who would pursue the subject beyond the present opinion. In the majority opinion, after considering the authorities, it is said:

"We take from these authorities, based, as we think, on sound reasoning:

"First, that one may repudiate an agreement to marry, when, subsequently to the making of the contract, he becomes afflicted with a loathsome disease, which, upon the consummation of the marriage, may be communicated to the spouse and to the offspring born of said marriage.

"Second, when, after the making of the contract to marry, he becomes afflicted with a fatal and incurable malady, and the consummation of the marriage would hasten his death, he is not bound to perform by consummating the marriage, and therefore is not liable in damages for such failure. Or, in other words, that there is implied in every contract to marry that the parties will not endanger life or health in the consummation of the marriage; and that, where illness or disease comes upon one after making the contract to marry, such as would render marriage dangerous to his life, a breach of the contract, based on such unavoidable and such unanticipated condition, is excusable. We do not mean by this that the danger should be simply problematical, or a possible contingency—one that may or may not be a resultant consequence of the act of consummating the marriage—but one which the evidence renders reasonably certain is the inevitable consequence of such an act. Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused.

"Third, that, where one is stricken, before the time arrives for the consummation of the marriage, with a fatal malady, and has but a few days or weeks or months to live, and the evidence makes this reasonably certain, he is excused from the consummation of the marriage, and, being excused, his estate, upon his death, is not liable in damages for such failure."

A consideration of the authorities is satisfying to us that the rule announced by the Iowa court is the rule sustained by reason and the weight of authority. Applying it to the facts of the instant case, the defendant was not excused in the breach of the agreement by his physical condition. The trial judge correctly charged the jury that they

might consider defendant's physical condition upon the question of postponement of the marriage (see Trammell v. Vaughan, supra) and in mitigation of damages (Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199).

Error is assigned on certain excerpts of the charge, and also upon the refusal to grant certain preferred requests. The charge as a whole was fair, and fully protected the rights of the defendant and upon the whole correctly stated the law applicable to the facts.

Upon the argument we were impressed that the verdict was excessive. It is possible that this tentative impression was due to the fact that the verdict was larger than we would have given had we been the triers of the facts. But a careful reading of this record is convincing that we cannot reduce this verdict without transcending our power as an appellate tribunal. There was in the case no appeals to passion or prejudice, nor is the verdict such a one as in and of itself bears upon its face evidence of passion or prejudice, or a disregard of the evidence, when we consider the record before us. It is not such a verdict as shocks one's sense of justice. While the record is convincing that the parties were matter of fact sort of people without such great affection as is seen depicted on the modern screen, the fact remains under the finding of the jury that for six years plaintiff was bound to defendant by her agreement to marry him, and that these were years when women may usually expect to make their successful matrimonial alliances. The parties are estimable people; both stand high in their community. Defendant owns 240 acres of good land, worth approximately $20,000, incumbered with an indebtedness of $8,000. He had probably $5,000 of personal property. He sold from the farm, between the time this action was brought and the time of the trial, $3,500 worth of stock and produce. His explanation of the manner of disposal of this sum is not entirely satisfactory. During the sickness of both his father and mother plaintiff went to their home where defendant resided, and upon two occasions of four months each assisted in their care and performed the household duties without pay. Defendant had the assistance of able counsel, and unless we substitute our judgment for that of the jury, which has the approval of the trial judge, this verdict must stand. Recognizing our power and our duty as determined in numerous decisions we must decline to disturb the verdict.

The judgment will be affirmed.[15]

STEERE, SHARPE, MCDONALD, and MOORE, JJ., concurred with FELLOWS, J.

BIRD, J. (dissenting in part). Defendant amended his plea before trial by giving notice that—

"Please to take notice: That under the general issue above pleaded, the defendant will give in evidence and insist in his defense that about four years ago this defendant became, without any fault on his part,

[15] The authorities are collected in a note in 33 A. L. R. 1238.

afflicted with an infectious and communicable disease, viz. a cancerous growth on the inner side of his lower lip, which he has been unable to cure; that at times said cancerous growth gives forth a poisonous, infectious, and communicable discharge, well calculated to infect the glands of his throat, intestines and other vital organs of his body which will ultimately, if not arrested, cause his death; that the discharge is well calculated to endanger the life and health of any individual that he might come in contact with; that said plaintiff knew of this cancerous condition shortly after defendant became afflicted therewith; that it has been a matter of deep concern to the defendant, and has been talked of between them regarding his condition."

Upon the trial proof was given as to the character of the cancer on defendant's lip, and expert witnesses who had examined it testified that the discharge was infectious, that the tendency was to increase in area, and extend to other organs of the body, and, while they could not say that cancer was hereditary, they did say and gave examples where it had run in families for several generations.

At the close of the proofs the court was requested by defendant's counsel to charge the jury as follows:

"That if you are satisfied by a preponderance of the evidence that these parties were engaged to be married; and that defendant thereafter became afflicted with a cancerous growth on the inner side of the lower lip, and that he is still suffering from such malady; and that the disease is a malignant, dangerous, and infectious one; that it is liable to spread to the glands of his throat, intestines, and the other organs of his body then defendant would be justified in refusing to marry the plaintiff, and she cannot recover in this case."

It will be observed that in the notice under the plea defendant's malady is disclosed. It did not, however, allege that defendant refused to marry plaintiff because of this malady.

Defendant was asked upon cross-examination:

"Mr. Cummings: Do you now claim that the reason you did not marry Bessie Shepler was because of this trouble on your lip? A. I do not."

Had defendant's pleading alleged that he refrained from marrying plaintiff because of his malady and supported it by his own or other testimony we think the trial court would have been in error in refusing to give the foregoing request. Considering the condition of the proofs the request was properly denied. In view of the fact that the pleading made no such claim, and defendant denied that he made such a claim, I am unable to see how the legal question discussed by Mr. Justice Fellows is involved in this controversy. Unless defendant himself made the defense of incapacity by reason of his malady, the jury could not be asked to so find. The testimony bearing on the existence and condition of the cancer was material only for the purposes indicated by the trial court.

Excepting that part of the opinion of Mr. Justice Fellows bearing on the question of whether defendant's malady was a defense to the action, I concur in the result reached by him.

CLARK, C. J., and WIEST, J., concurred with BIRD, J.

SUPPLEMENTAL NOTES [16]

WHETHER THE ACTION FOR BREACH OF PROMISE SURVIVES

In the early and leading case of Chamberlain v. Williamson, 2 Maule & S. 408 (1814), Lord Ellenborough held that the action did not survive the death of plaintiff, where the declaration contained no allegation of special damage. Following this case, it has generally been held that the action does not survive the death of either plaintiff or defendant. Stebbins v. Palmer, 1 Pick. 71, 11 Am. Dec. 146 (1822), rule not changed by St. 1842, c. 89, according to Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Grubb v. Sult, 73 Va. 203, 34 Am. Rep. 765 (1879); Hayden v. Vreeland, 37 N. J. Law, 372, 18 Am. Rep. 723 (1875); Hovey v. Page, 55 Me. 142 (1867); Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183 (1825); Frazer v. Boss, 66 Ind. 1 (1879), construing 2 Rev. St. 1876, p. 309, § 783; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250 (1874); Weeks v. Mays, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212 (1889), construing Milliken & V. Code, § 3560; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757 (1899), construing Shannon's Code, § 4569; Larocque v. Conheim, 42 Misc. Rep. 613, 87 N. Y. Supp. 625 (1904). [In Quirk v. Thomas (1913), 1 K. B. D. 799, it was held that the fact that the plaintiff had given up a profitable business at the deceased promisor's request did not cause the action to survive.]

In the following cases it was held that the action survived: Shuler v. Millsaps, 71 N. C. 297 (1874), and Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444 (1882), construing Battle's Rev. St. c. 17, § 65; Stewart v. Lee, 70 N. H. 181, 46 Atl. 31 (1899), construing Pub. St. 1891, c. 191, §§ 8–14. [Parsons v. Trowbridge, 226 F. 15, 140 C. C. A. 310, Ann. Cas. 1917C, 750 (1915), semble; Kennedy v. Rogan, 52 Mont. 242, 156 P. 1078 (1916).] And in Johnson v. Levy, 118 La. 447, 43 South. 46, 118 Am. St. Rep. 378, 9 L. R. A. (N. S.) 1020, 10 Ann. Cas. 722 (1907), it was held that the action survived where promisor was put in default by demand. See note to this case in 9 L. R. A. (N. S.) 1020.

DAMAGES IN SUITS FOR BREACH OF PROMISE

As to the various elements of damages, injury to feelings, reputation, loss of time, expenses incurred in preparation, loss of reasonable ex-

[16] These notes are reprinted from Vernier's Cases on Marriage and Divorce, pp. 28–31, with slight additions which are indicated by brackets. Some of the matter contained in them is also touched upon in the cases in this chapter, and the notes thereto.

pectation, etc., see the following cases: Tobin v. Shaw, 45 Me. 331, 71 Am. Dec. 547 (1858); Smith v. Sherman, 4 Cush. (Mass.) 408 (1849); Harrison v. Swift, 13 Allen (Mass.) 144 (1866); Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936 (1883); Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581 (1895); Poehlmann v. Kertz, 105 Ill. App. 249 (1902), affirmed in 204 Ill. 418, 68 N. E. 467 (1903); Grubbs v. Pence, 73 S. W. 785, 24 Ky. Law Rep. 2183 (1903); Graves v. Rivers, 123 Ga. 224, 51 S. E. 318 (1905). [See, also, Shepler v. Chamberlain, 226 Mich. 112, 197 N. W. 372, 33 A. L. R. 1232 (1924), supra, p. 532; Rubin v. Klemer, 44 R. I. 4, 114 A. 131, (1921).]

To the effect that evidence of defendant's reputation for wealth is admissible on the question of damages, see Hunter v. Hatfield, 68 Ind. 416 (1879); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880); Stratton v. Dole, 45 Neb. 472, 63 N. W. 875 (1895); Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784 (1891); Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557 (1903) [Meyer v. Mayo, 173 App. Div. 199, 159 N. Y. S. 405 (1916); Fellers v. Howe, 106 Neb. 495, 184 N. W. 122 (1921); Smillie v. Mendoza, 68 Colo. 461, 190 P. 533 (1920).]

Contra: Johansen v. Modahl, 4 Neb. (Unof.) 411, 94 N. W. 532 (1903).

Plaintiff may show circumstances of contumely, and aggravation attending the breach of the promise, as fact that friends have been invited to the wedding, Reed v. Clark, 47 Cal. 194 (1873); slanderous statements of defendant, Chesley v. Chesley, 10 N. H. 327 (1839).

The seduction of plaintiff by virtue of the promise may also be shown to aggravate the damages. Tubbs v. Van Kleek, 12 Ill. 446 (1851); Haymond v. Saucer, 84 Ind. 3 (1882); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wilber v. Johnson, 58 Mo. 600 (1875); Kniffen v. McConnell, 30 N. Y. 285 (1864); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906); Sramek v. Sklenar, 73 Kan. 450, 85 Pac. 566 (1906), etc. [Stokes v. Mason, 85 Vt. 164, 81 A. 162, 36 L. R. A. (N. S.) 388, Ann. Cas. 1914B, 1199; Gauerte v. Kiley, 171 Wis. 543, 177 N. W. 889 (1920). See also, p. 529, note 12, supra.]

Contra: Perkins v. Hersey, 1 R. I. 493 (1851); Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912 (1906); Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159 (1845). [Cf. Gilman v. Katz, 210 App. Div. 516, 206 N. Y. S. 790 (1924).]

Where defendant in bad faith tried to prove that plaintiff was unchaste and entirely failed, it was held that this might be considered in aggravation of damages. Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293 (1898); Liese v. Meyer, 143 Mo. 547, 45 S. W. 282 (1898). [Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561 (1870).] In Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25 (1897), it was so held, although the charge was made in good faith. See note criticising the case in 11

Harv. L. Rev. 268. [Cf. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann Cas. 1915A, 295 (1913).]

To mitigate damages defendant may show that plaintiff's loss is less than claimed, as by showing that plaintiff is unchaste, Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783 (1901); that defendant is inflicted with an incurable disease, Sprague v. Craig, 51 Ill. 288 (1869). Whether defendant may show that after breach he renewed his offer of marriage is doubtful. That he can, see Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441 (1846); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881). [Cf. Lynch v. Figge, 194 App. Div. 126, 185 N. Y. S. 777 (1920).] That he cannot, Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442 (1880).

When the Right to Sue Accrues; Statute of Limitation

Where the promise is to marry at a fixed time, and the promise is renounced before the time fixed, it is generally held that suit may be brought at once, following the leading case of Frost v. Knight, L. R. 7 Ex. 111 (1872). See, to this effect, Sheahan v. Barry, 27 Mich. 217 (1873); Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516 (1870); Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208 (1871); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Adams v. Byerly, 123 Ind. 368, 24 N. E. 130 (1890); Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 (1900); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900); Burke v. Shaver, 92 Va. 345, 23 S. E. 749 (1895); Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47 (1896); Zatlin v. Davenport, 71 Ill. App. 292 (1897); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103 (1906). [Bowes v. Sly, 96 Kan. 388, 152 P. 17 (1915), evasion or refusal to see the plaintiff is a renunciation.]

Some of the cases above base the decision upon the doctrine of anticipatory breach as laid down generally in Hochster v. De la Tour, 2 El. & Bl. 678 (1853). Others, while dissenting from the general doctrine of anticipatory breach, apply it to promises to marry.

Suit may also be brought at once, where defendant disables himself (as by marriage to another) from carrying out his promise. Short v. Stone, 8 Q. B. 358, 15 L. J. Q. B. 143 (1846); Clements v. Moore, 11 Ala. 35 (1847); Sheahan v. Barry, 27 Mich. 217 (1873); Hunter v. Hatfield, 68 Ind. 416 (1879); Schroeder v. Michal, 98 Mo. 43, 11 S. W. 314 (1889); McCarville v. Boyle, 89 Wis. 651, 62 N. W. 517 (1895); Kerns v. Hagenbuchle, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367 (1892); Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914 (1900). [If the promise is to marry at a date certain, no request by the plaintiff is necessary. Parkinson v. Murphy (R. I.) 107 A. 235 (1919).]

Where no time for performance is fixed, the right to sue accrues

after a reasonable time. Stevenson v. Pettis, 12 Phila. 468 (1877); Blackburn v. Mann, 85 Ill. 222 (1877). It was also held in the latter case that, where the parties through a period of years treat the contract as a continuing one, no right to sue accrues until one of the parties breaks the engagement. [A request for a slight variation from the arrangement as to the time, place, or circumstances of the marriage does not constitute a renunciation nor is such request an excuse for a refusal to marry.]

The period of limitation begins to run from the time of breach, and not from the time of contract. Hanson v. Elton, 38 Minn. 493, 38 N. W. 614 (1888); Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466 (1903).

CHAPTER 2

MARRIAGE

SECTION 1.—FORMAL REQUISITES

DENISON v. DENISON.

Court of Appeals of Maryland, 1871. 35 Md. 361.

The cause was argued before BARTOL, C. J., STEWART, BOWIE, BRENT, and ALVEY, JJ.

ALVEY, J., delivered the opinion of the court.

The first question to be decided in this case arises upon the motion of the appellee to dismiss the appeal. The ground of the motion is, that the record has not been made up as required by law; that the Act of 1867, c. 373, § 3, which provides for taking testimony in the orphans' court of Baltimore city by a stenographer, has not been complied with, inasmuch as the depositions have not been signed by the witnesses who testified, nor by the stenographer, or the presiding judge of the court. But, in answer to this motion, it is enough to say, that the record discloses nothing to indicate to this court with certainty that the testimony was taken under the authority of the act referred to. It may, for aught that appears, have been taken in the ordinary way; or, what is more likely, judging from the statement of counsel, it may have been taken under an agreement of the parties, whereby the signatures of witnesses, and of the stenographer and judge were all waived. The mere fact that in the summary of costs, indorsed on the record, an item occurs for the services of a stenographer, is not such evidence that the testimony was attempted to be taken under and by authority of the Act of 1867, as will justify this court in regarding it. The motion to dismiss therefore must be overruled.

The case being before us, the record presents questions of great and most delicate interest to society, and which would seem to be presented for the first time for direct adjudication in this state.

The appellee alleges herself to have been the lawful wife of Henry C. Denison, who lately died intestate, and, as his widow, entitled to the one-half of his personal estate; the intestate dying without children.

It is not pretended that there was ever any solemnization of marriage between the appellee and the deceased, but it is alleged by the appellee that, from the 17th of January, 1863, until the death of the intestate, he and she were husband and wife, they having mutually agreed from that time thenceforth to be and regard each other as such; that,

in pursuance of such agreement, they cohabited and lived together as man and wife; that the appellee was maintained and supported by the deceased, up to the time of his death, as his wife; and that they both acknowledged, recognized, and acted towards each other in all things as husband and wife, and were known, treated, and reputed to be such, among their friends and acquaintances.

Upon proof taken, the orphans' court decided that the appellee had been lawfully married to the deceased, and that, as his widow, she was entitled to share in the distribution of his estate. It is from such decision that the present appeal is taken.

Without any special reference to the evidence, as to whether the allegations of the appellee are fully proved, the first question that presents itself is whether such marriage as is here set up and relied on, can be maintained by the laws of this state.

It is contended on the part of the appellee that such marriage is good and effectual at the common law, or rather by the canon law; and that, as we have adopted the common law of England, of which the canon law forms part, this marriage must be sustained, having been contracted by the parties, as it is alleged, per verba de præsenti. This proposition, on the other hand, is controverted by the appellant, by whom it is contended that such marriage, even if contracted as alleged, was not valid and binding, because it was not duly celebrated according to the rites of any church, or religious denomination of any kind whatever; and that the common law gives no sanction to any such marriage as that attempted to be established by the appellee.

In order to determine this question, we shall, in the first place, endeavor to ascertain and show what the common law of England required to make a valid and binding marriage, prior to the Marriage Act of 26 Geo. II, c. 33; and, in the second place, what is required, either by the common or statute law of Maryland, in that respect.

By the canon law of Europe, founded mainly upon the Roman civil law, prior to the Council of Trent, in the sixteenth century, the contract of marriage was regarded as simply of a consensual nature, only differing from other contracts in its being indissoluble even by the consent of the parties. In form, a contract per verba de præsenti, or a promise per verba de futuro cum copula, constituted a valid marriage, without the offices of a priest, till the decrees of the Council of Trent, which required the intervention of the parish priest to give validity to the marriage. The promise per verba de futuro, when followed by carnal intercourse, was considered as equivalent in legal effect to the contract per verba de præsenti. In the matrimonial law, as administered by the canonist, it was a maxim, consensus, non concubitus facit nuptias; and this remains the law to the present day in some parts of Europe, where the civil and canon law prevail, and where the decrees of the Council of Trent have not been accepted—as in Scotland. Dalrymple v. Dalrymple, 2 Hag. C. Rep. 54.

But the civil and canon laws, as such, never had force in England. They were regarded and accepted only as part of the common or unwritten law. Blackstone, in speaking of the subordinate character of these laws, says that "it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and leges sub graviori lege; and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the King's Ecclesiastical Law." 1 Com. 84. And so Professor Wooddesson, in his Lectures on the Laws of England (Lect. 5, p. 78,) says: "Many of our present ecclesiastical laws are undoubtedly of foreign extraction, and some are entirely of English origin. But now they all alike depend, as to their general binding authority, on the same foundations as the whole body of our English laws, immemorial custom, and express Act of Parliament." The decrees of the Council of Trent, however, were never accepted or recognized to be of any force whatever in England.

The civil and canon laws, therefore, have no operation in England, except only as they may have been incorporated into the system of the common law; and, in ascertaining what was the law of England in regard to the mode and manner of contracting marriage prior to or independently of the Marriage Act of 26 George II, passed in 1753, we do not appeal to the civil or canon law as such, but to the common law as a system peculiar to England and her institutions.

What then, by the law of England, prior to the Marriage Act, was the effect of an engagement of matrimony, such as is alleged to have been entered into by the parties here, merely per verba de præsenti, or, in other words, a contract of present marriage, without any solemnization or celebration whatever?

We can best answer this question by resorting to and quoting from some few standard authorities, which have been approved and repeatedly relied on by all the highest courts in England, as containing a true and correct expression of the law.

Perkins, an author of high repute, who wrote in the time of Henry VIII, in his Treatise on the Laws of England, §§ 194, 195, 306, stated it as unquestionable law that, after a contract of marriage between a man and a woman, they were not one person in law, inasmuch as, in case of the woman's death before the marriage solemnized between them, the man to whom she was contracted should not have her goods as her husband. And so again, he says, that, if a man, seized of land in fee, make a precontract of matrimony with J. S. and die before the marriage is solemnized, she shall not have dower, for she never was his wife.

Swinburne, an author of the time of Queen Elizabeth, in his Treatise on Espousals, § 17, says: "Spousals de præsenti, though not consum-

mate, be in truth and substance very matrimony. Although by the common law of this realm (like as it is in France and other places) spousals, not only de futuro, but also de præsenti, be destitute of many legal effects wherewith marriage solemnized doth abound, whether we respect legitimation of issue, alteration of property in her goods, or right of dower in the husband's lands." And again he says: "Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage betwixt those which have contracted spousals, and some have relation to their lands and goods. Concerning their issue, true it is that by the canon law the same is lawful; but by the laws of this realm, their issue is not lawful, though the father and the mother should afterwards celebrate marriage in the face of the church. Likewise concerning lands, by the canon law the aforesaid issue may inherit the same; but it is otherwise by the laws of this realm, for, as the issue is not legitimated by subsequent marriage, no more can he inherit his father's land; and, as he cannot inherit, no more is she to have any dower of the same lands, for whereas, by the laws of this realm, a married wife is to have the third part of her husband's lands, holden in fee simple or fee tail, either general or special, for her dower after her husband's death, during her life, so that she be above the age of nine years at her husband's death, yet, a woman having contracted matrimony, if the man to whom she was betrothed die before the celebration of the marriage, she cannot have any dower of his lands, because as yet she is not his lawful wife, at least to that effect. Concerning goods, the like may be said of them as hath already been spoken of lands, that is to say, that, although by the civil and canon laws, where the man doth gain any of the woman's goods, or the woman gain any of the man's goods, by reason of marriage, spousals de præsenti or de futuro, consummate with carnal knowledge, have the same effect as hath matrimony solemnized, yet by the laws of this realm it is otherwise; so that neither spousals de præsenti, neither spousals de futuro consummate, do make her goods his or his goods hers; and hence it is that a woman contracted in matrimony, dying before the celebration of the marriage, may make her testament, and dispose of all her goods at her own pleasure, which after solemnization of the marriage she cannot do without his license and consent. And on the other side, the man dying intestate before celebration of the marriage, the woman to whom he was betrothed surviving cannot obtain the administration of his goods as his widow, which otherwise, the marriage being solemnized, she might do. And the like I read to be observed in divers other countries, as in France and Saxony, where neither he nor she gain any part of the other's goods by being affianced, unless the marriage be solemnized, if not consummate also."

The principle stated by Perkins and Swinburne, as to the inchoate nature of the marriage contract per verba de præsenti at the common law, is distinctly recognized by Lord Hale, in a manuscript note, which was incorporated by Mr. Hargrave among the notes to Co. Litt. 33a.

This distinction between the common law of England and the canon law of Europe, unaffected by the decrees of the Council of Trent, as to the force and effect of the contract of marriage per verba de præsenti, has been very distinctly recognized to exist by the most distinguished judges of the ecclesiastical courts of England. In the case of Scrimshire v. Scrimshire, 2 Hag. C. R. 395, a cause for the restitution of conjugal rights, decided in 1752, by Sir Edward Simpson, that learned judge, in declaring against the legality of the marriage in that case, said: "And I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as thirds, dower, etc." So, in the case of Dalrymple v. Dalrymple, before referred to, Sir William Scott, in the course of the celebrated judgment delivered by him in that case, involving the marriage law of Scotland, as distinguished from the law of England, after citing Swinburne in support of his positions, said, that "the common law had scruples in applying the civil rights of dower and community of goods and legitimacy, in the cases of these looser species of marriage," meaning the marriages recognized by the civil and canon law, as it prevailed in Scotland, unaffected by ecclesiastical decrees.

Perhaps the law is found nowhere better or more clearly stated than in Park on Dower—a very learned and reliable authority. He says, page 8, that, "By the ecclesiastical law, as it stood previous to the Marriage Act (26 George II, C. 33,) and as it still stands as to cases falling within the exceptions of that act, the existence of matrimony involved a twofold consideration, comprising, within that general name the distinct facts, 1st, the espousals, of personal contract between the parties to become husband and wife; and, 2dly, the celebration of that contract in facie ecclesiæ. The espousals, or matrimonial contract, which, though requiring no set form or ceremonial, was the substance or bond of the nuptial relation, was of two kinds, viz.: Per verba de præsenti, or per verba de futuro. The former of these, in the contemplation of the ecclesiastical law, amounted to very matrimony, the contract being indissoluble by any agreement of the parties, and rendering any subsequent marriage of either of them with any third person absolutely void. But though espousals, or affiance, as it is sometimes termed, was thus the very substance of matrimony, and even by the temporal lawyers, the terms 'affiance' and 'marriage' were often promiscuously used, yet it does not seem to have been allowed that espousals alone, unaccompanied by celebration, should confer the civil rights of dower or legitimacy; but to obtain these temporal advantages it was requisite that the contract of matrimony should be celebrated in the face of the church. And though in one case a woman who had made a contract of marriage per verba de præsenti, but whose marriage had not been celebrated till after the alienation of the husband, recovered her dower upon the ground that the alienation of the land by the husband in the interval between a sentence of the ecclesiastical court for execution of

the contract, and the celebration of matrimony pursuant to that sentence, was a fraudulent alienation, quoad the wife, yet this recovery was reversed coram rege et concilio, because neither the contract nor the sentence was a marriage by the temporal law, and so the husband had no seisin during his marriage with the demandant." The author cites the note of Lord Hale, to Co. Little, 33a.

From all the common-law authorities it would appear that the contract per verba de præsenti, or per verba de futuro cum copula, could be carried into effect and execution by the ecclesiastical courts. But until such contract was sanctioned by religious ceremony, duly performed, the marriage was incomplete, and did not confer the civil rights incident to the married state.

In 1843, the celebrated case of Reg. v. Millis, 10 Cl. & Fin. 534, involving the legality of a marriage not celebrated according to the rites of the Church of England, was brought into the House of Lords, on appeal from the Queen's Bench in Ireland. It was a case to which the Marriage Act of 26 George II did not apply. The appellee, Millis, having contracted two marriages, and being indicted for bigamy, the question was whether the first marriage was legal and complete, not having been celebrated according to the rites of the Church of England, to which the accused belonged. The case was most elaborately argued, both at the bar and by the judges who participated in the decision. All the learning upon the subject was fully developed and illustrated. The opinion of the judges of England was taken, and by their unanimous opinion, as delivered by Chief Justice Tindall, it was declared "that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage per verba de præsenti was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders." The judgment of the court below being against the validity of the first marriage, and the law Lords being equally divided in opinion, the rule "semper præsumitur pro negante" applied, and judgment was affirmed.

The same question, but in a different form, was again presented to the House of Lords in 1861, in the case of Beamish v. Beamish, 9 H. L. Cas. 274; and by the unanimous opinion of the judges and the law Lords who heard the case, the decision in Reg. v. Millis was reaffirmed. In these cases will be found all the learning upon the subject of what is called canon law marriages, as distinguished from marriages celebrated with religious solemnity.

Such then being the law of England upon this subject, prior to and independently of the Marriage Act of 26 George II, which was never adopted in this state, in what does that law differ from the law as it has heretofore existed and still exists, in this state?

It is true the common law of England has been adopted by the people of this state; but only so far as it could be made to fit and adjust itself to our local circumstances and peculiar institutions. The ecclesiastical polity of England forms no part of the common law as we have adopted it. We have in our systems no tribunal, as in England, clothed with power and jurisdiction to enforce the solemnization of marriages between parties contracting per verba de præsenti. Unless, therefore, there be something in the law of this state, apart from the common law of England, to render such contracts valid without solemnization, it follows, necessarily, that they can, at most, only be valid to the extent that they are good at the common law without solemnization; and, as we have seen, such unsolemnized contracts are incomplete, and are not effectual to confer legitimacy upon the issue, nor the rights of property upon the parties—a right that is attempted to be enforced in this case.

But is there any principle or provision of law peculiar to this state that would render valid and effectual the marriage here set up, so that it would confer the rights of property and carry the other legal incidents of a valid marriage? We know of none. On the contrary, we think we are safe in saying that there never has been a time in the history of the state, whether before its independence of Great Britain or since, when some ceremony of celebration was not deemed necessary to a valid marriage. In the early days of the province it was not absolutely necessary that a minister of religion should officiate—a judge or a magistrate could perform the ceremony—but still, in all cases, some formal celebration was required. Act 1715, c. 44, § 24. The whole subject was particularly regulated by the Act of 1717, c. 15, so far as the members of the Church of England were concerned. Persons of other denominations were allowed to be married according to pre-existing law. But these acts clearly show that no such marriage as that here alleged to have been contracted was ever contemplated by the Legislature, or was ever supposed for a moment to be good. The act of 1777, c. 12, concerning marriages, and which forms article 60 of the Code, plainly indicated the understanding of the Legislature to be that no marriage was to be thereafter good and valid, unless celebrated by some religious rites and ceremony. It expressly provided that the rites of marriage should not be celebrated by any person within this state, unless by some ordained minister, or in such manner as was used and practiced by the Society of Quakers. It moreover provided that no person within the state should marry without first obtaining a license, to be directed to a minister or other person qualified by law to celebrate marriage in the state, or until after banns published in some house of religious worship, or by a minister, as therein directed; and it prescribed a penalty upon parties going out of the state to be married contrary to the provisions of the act. Why this latter provision, if valid marriages could be contracted in the manner contended for by the counsel for the appellee?

It is true, the act contains no express prohibition or declaration of absolute nullity of marriages contracted per verba de præsenti; but it is plainly to be perceived that such marriages, if allowed, would contravene the spirit and policy of the act. The implication from the provisions of the act are exceedingly strong against such marriages, and the practice and custom of the people of the state have been so universally in conformity with what would appear to have been the policy and requirement of the law that such custom has acquired the force and sanction of law; even though a question could be made as to the technical construction of the act itself. Besides, as we have seen, an unsolemnized contract of marriage, at the common law, is inchoate merely, or incomplete, being ineffectual to confer many of the most important rights of the matrimonial state; and, to supply the defect of solemnization, positive law was required. Such positive law has never been provided, and consequently a marriage contracted in this state merely per verba de præsenti, or per verba de futuro cum copula, has no sanction in our law, whatever may be the law upon this subject elsewhere. To constitute lawful marriage here, there must be superadded to the civil contract some religious ceremony. The law, however, does not prescribe the form, nor according to the rites of what church the marriage shall be celebrated.

The case of Cheseldine v. Brewer, 1 Har. & McH. 152, decided in 1739, relied on by the appellee, is not entitled to the authority attributed to it. It was a case occurring at the Assizes for St. Mary's county, and it is not shown by what judges it was decided, nor upon what ground the decision on appeal proceeded. It would appear that the question raised was simply as to the effect of evidence to give rise to the presumption of legal marriage. The case is very shortly and imperfectly reported, and there is nothing in it to give it the force of authority.

So far as we are informed, this is the first instance in which a marriage contract of the nature of the one here set up, alleged to have been made in this state, has ever been attempted to be maintained, as constituting a valid marriage, in any of our courts. These loose and irregular contracts, as a general thing, derive no support from morals or religion, but are most generally founded in a wanton and licentious cohabitation. Hence the law of the state has given them no sanction.

In this case, however, if the law were different from what it is, the claim of the appellee could not be sustained. The appellee is objected to as an incompetent witness, and, without her testimony, the evidence is insufficient to prove clearly the alleged marriage. The other alleged contracting party being dead, and this being a controversy with his administrator, the appellee is clearly incompetent under the Act of 1864, as modified by the Act of 1868. The appeal being from the orphans' court, exceptions to the admissibility of evidence or the competency of witnesses are not required to be taken in the court below, but may be taken and insisted on in this court. Stewart v. Pattison, 8 Gill, 46. In no view, therefore, could her pretensions be supported.

The decision in the orphans' court will be reversed, and the cause remanded, that the petition of the appellee be dismissed.

Order reversed, and cause remanded.[1]

DUMARESLY v. FISHLY.

Court of Appeals of Kentucky, 1821. 3 A. K. Marsh. 368.

The CHIEF JUSTICE delivered the opinion.

This was an action for slanderous words. The defendant pleaded that the plaintiff is and was, at the emanation of the writ, his lawful wife; to which the plaintiff replied, traversing the allegations of the plea, and issue was thereupon joined to the country.

On the trial of the issue in the circuit court, it appeared from the evidence that, some time previous to the commencement of the suit, a license for the marriage of the plaintiff and defendant had been issued by the clerk of the county court of Jefferson county, with the consent of plaintiff's father, and that the marriage ceremony was performed at the house of her father in Jeffersonville, in the state of Indiana, where she resided, by the reverend Mr. Chabrat, a priest of the Roman Catholic religion, who had previously obtained from the county court of Nelson county in this state, where he

1 The case of Reg. v. Millis, 10 Clark & Fin. 534 (1843–44), cited by the court, contains, in the opinions and dissenting opinions, an exhaustive discussion of the English precedents.

"And now we have to say that in the year 1843 in our highest court of law three learned lords maintained the thesis that by the ecclesiastical and the common law of England the presence of an ordained clergyman was from the remotest period onward essential to the formation of a valid marriage. An accident gave their opinion the victory over that of three other equally learned lords, and every English court may now-a-days be bound to adopt the doctrine that thus prevailed. It is hardly likely that the question will ever again be of any practical importance, and we are therefore the freer to say that, if the victorious cause pleased the lords, it is the vanquished cause that will please the historian of the middle ages."

"We refer to the famous case of The Queen v. Millis, 10 Clark & F. 534 (1843–44), which was followed by Beamish v. Beamish, 9 House of Lords Cases, 274 (1861). The Irish Court of King's Bench was equally divided. In the House of Lords, after the opinion of the English judges had been given against the validity of a marriage at which no clergyman had been present, Lords Lyndhurst, Cottenham, and Abinger were for holding the marriage void, while Lords Brougham, Denman, and Campbell were in favor of its validity. Owing to the form in which the question came before the House, the result of the division was that the marriage was held to be void. Among the pamphlets evoked by this case, two tracts by Sir John Stoddart deserve special mention. He argues with great force against the historical theory to which our law seems to be committed. In this he has been followed by Dr. Emil Friedberg, whose Recht der Eheschliessung contains a minute discussion of English law. See, also, a paper by Sir H. W. Elphinstone in 5 L. Q. R. p. 44. But the very learned opinion given by Willes, J., in Beamish v. Beamish is the best criticism of the victorious doctrine." 2 Pollock and Maitland Hist. of Eng. Law (2d Ed.) p. 372.

See, also, note, p. 560, infra.

resided, a testimonial authorizing him to celebrate the rites of matrimony; but that the defendant declined cohabiting with the plaintiff, and that the marriage had not been consummated.

After the evidence was closed on both sides, the counsel for the defendant moved the court to instruct the jury, that if they believed the whole evidence in relation to the intermarriage of the plaintiff with the defendant, and that the marriage had been celebrated between the plaintiff and defendant before the commencement of this suit at Jeffersonville, in the state of Indiana, and not in Jefferson county in this state, the marriage was nevertheless valid, and that in that case they should find for the plaintiff. The court, with the assent of the plaintiff, reserved the point, not being prepared to give an opinion, and the jury gave a verdict for the plaintiff, subject to that opinion. The court, after taking time to consider, decided that the law was for the defendant on the point reserved, and rendered judgment accordingly; to which the plaintiff excepted, spreading the whole evidence in detail upon the record, and has brought the case to this court by an appeal.

As the marriage was entered into in the state of Indiana, the question in relation to its validity, must, no doubt, be decided by the laws of that state. Whether, however, we consider the question with reference to the laws of Indiana or this country, the result will be the same. For the statute of that country, regulating marriages, which was read on the trial in the circuit court, and made a part of the record by the bill of exceptions, appears, as to its effect upon the point now in controversy, not to differ materially from the statute of this country upon the same subject, and the common law is in force in that as well as in this country, so far as it has not been altered or repealed by statute. It is obvious that the marriage between the parties in this case was not celebrated according to the provisions of the statute of either country. It was not done according to the provisions of the statute of this country, because the female party did not reside in the county, from the clerk's office of which the license was issued; and it was not done according to the statute of Indiana, because the license was not issued by the proper officer of that state.

But neither the statute of Indiana nor that of this state avoids a marriage not celebrated according to its provisions. The object of the legislature of both states was manifestly, not to declare what should be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it; for the legislature speaks not of the validity of the marriage, but of the celebration of its rite, and addresses itself, not to the parties themselves, but to the functionaries whom it authorizes to perform the requisite ceremonies in solemnizing the marriage. In short, the legislature of either state has done nothing more than substitute a statutory mode of solemnizing the rites of matrimony, instead of the common law mode of

doing it in facie ecclesiæ; and it was necessary to do this, because there was in this country no church established by law, and consequently none that had authority to solemnize the rites of matrimony. The effect, therefore, of the statutory mode of solemnizing matrimony must be precisely the same, with respect to the validity of a marriage in this country, as the common law mode with respect to the validity of a marriage in England. We are then led to enquire what the doctrine of the common law is, upon this subject.

Marriage is nothing but a contract; and to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract—willing to contract, and should actually contract.[2] A marriage thus made without further ceremony, was,

[2] Statutes in a number of states expressly state that marriage is "a civil contract," or that it is a relation arising out of a civil contract.

On the nature of marriage, see, also, Randall v. Kreiger, 23 Wall. 137, at page 147, 23 L. Ed. 124 (1874), where Swayne, J., said: "Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one sui generis. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation."

See, also, Ditson v. Ditson, 4 R. I. 87, at page 101 (1856), where Ames, C. J., said: "Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution."

And in Noel v. Ewing, 9 Ind. 37, at page 49 (1857), Stuart, J., used the following language: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity. Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as

according to the simplicity of the ancient common law, deemed valid to all purposes and such continued to be the law of England until the time of Pope Innocent the Third, when the ceremony of celebrating matrimony in facie ecclesiæ was first introduced into that country. That ceremony, however, though introduced by the usurpation of the church, was afterwards recognised to a certain extent by the common law; and it would have been idle for the law to have recognised the ceremony without attaching to it any legal consequence. It was therefore held, that to constitute a marriage de jure, and render it valid to every purpose, it must be celebrated in the church. But a marriage contracted without that ceremony, was, nevertheless, a marriage in fact, and was still deemed valid to most purposes. Baron and Feme 3, 4, and 5, 2 Salk. 437, and 2 Black. Com. 439; Johnson's Rep. 52.

Even in the ecclesiastical courts, a marriage de facto was not held to be void; for if the parties afterwards cohabited, they were not liable to be punished for fornication; and if either of them married another, such second marriage, though celebrated in facie ecclesiæ in due form, was deemed void ab initio.

And if in those tribunals by whose encroachments upon the civil authority, the ceremony of solemnizing in facie ecclesiæ was introduced, a marriage without that ceremony was deemed valid to some purposes, we would naturally expect that the courts of common law would regard such a marriage with still more indulgence. We accordingly find that, except in certain real actions, it was held not to be necessary to place a marriage de jure. For it was only in those cases that the plea of ne ungues accouple in loyal matrimony which put in issue, the legality of the marriage was admissible. In all personal matters and causes, a marriage de facto was sufficient, and in such cases the plea of ne ungues accouple in loyal matrimony was inadmissible. Baron and Feme, 44, 45.

Hence in the case of Alleyn and wife against Gray, 2 Salk. 437, which was an action of debt on a bond, the plea of ne ungues accouple in loyal matrimony was held bad on demurrer, not only because it changes the mode of trial, but because it admits a marriage but denies the legality of it; whereas, a marriage de facto is sufficient, and whether legal or not legal, is not material. So in an action of trespass brought by A against B and C. B pleaded that C is the wife of the plaintiff, and demanded judgment of the writ. The plaintiff replied ne ungues accouple in loyal matrimony, which

public policy may dictate. The sovereign power may, by general enactment, regulate and mold their relative rights and duties at pleasure."

For other comment on the nature of marriage, see Keyes v. Keyes, 22 N. H. 553 (1851), Adams v. Palmer, 51 Me. 480 (1863), and especially Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888), in which case, and other cases cited therein, it was held that marriage is not a contract within the meaning of the clauses in the federal and state Constitutions forbidding legislation impairing the obligation of contracts.

was held bad, and he was driven to say she was not his wife, for if she was his wife in fact, it was sufficient. Baron and Feme, ubi supra.

So in an action for criminal conversation, it is sufficient to prove a marriage in fact, though the evidence arising from cohabitation and reputation is not admissible to prove such marriage. And even in an indictment for bigamy, a marriage in fact is sufficient to warrant a conviction in case of a record marriage. Com. Dig. tit. Baron and Feme, letter B, and the cases there cited.

In fine, in every shape in which the question has been presented to the courts of common law in personal actions, or in relation to personal matters, a marriage in fact has been deemed valid. A contrary doctrine, in this country, would be attended with the most mischievous consequences. The statute prescribing the mode of celebrating the rites of matrimony, requires that when either party is under the age of twenty-one, the consent of the parent or guardian shall be given in person or in writing, that bond and security shall be given before license can be issued; that license shall be issued only by the clerk of the county where the female party resides; and that no clergyman who has not previously obtained testimonials for that purpose from the county court, shall celebrate the rites of matrimony. A compliance with the whole of these particulars is necessary to render the marriage conformable to the statute; and a failure to comply with any one of them, would render it but a marriage in fact; and if a marriage in fact be void, many of the marriages of the country would be so, for there are many in which there has been a failure either intentionally or otherwise, to comply with some one or more of the formalities presented by the statute. A doctrine which would thus tend to vitiate a great proportion of the marriages of the country would result in incalculable evils, and cannot be admitted to be correct.

But admitting a marriage in fact to be valid, it is contended that to constitute such a marriage, a consummation is necessary; and it is inferred, as the marriage in this case was not consummated by cohabitation, that it does not amount even to a marriage in fact.

The position assumed in this argument is absolutely untenable. It is neither founded on reason nor supported by authority. By the law of nature, the contract of marriage is complete without consummation. 1 Rutherford's Inst. 345; and it is a maxim of the common law, borrowed, it is true, from the civil law, but founded upon the reason and nature of the thing, "that consensus, non concubitus facit matrimonium." Co. Lit. 34; 1 Black. Com. 433.

Marriage and cohabitation are two things. The latter is the object to be obtained by the former, and to make it lawful, must be preceded by the former. It is said, indeed, that a marriage contracted per verba de futuro, which is in truth nothing but a promise to marry in future, is a valid marriage if the parties afterwards

cohabit; but the cohabitation, even in that case, does not constitute the marriage. It is only evidence of the marriage; and the same authorities which say that a contract per verba de futuro becomes a marriage if the parties afterwards cohabit, invariably lay down the doctrine that a marriage per verba de præsenti is, forthwith, a marriage, and complete without cohabitation.

Upon the whole, therefore, a majority of the court are of opinion that it was sufficient for the defendant to support the issue on his part, to prove a marriage in fact; and that the marriage proved in this case was of that character.

The decision of the point reserved by the circuit court was, therefore, correct, and the judgment must be affirmed.

MILLS, J., dissented.

BEVERLIN v. BEVERLIN.

Supreme Court of Appeals of West Virginia, 1887. 29 W. Va. 732, 3 S. E. 36.

SNYDER, J. Suit in equity, instituted November 20, 1884, by Elizabeth Beverlin against Israel A. Beverlin, in the circuit court of Taylor county, for a divorce a mensa et thoro, and for alimony. * * *

The circuit court in its final decree, entered April 1, 1886, decided in favor of the plaintiff, awarding her a divorce a mensa et thoro from the defendant, and requiring him to pay to her $250 annually for her support. From this decree the defendant has appealed.

The first question to be considered is whether or not any marriage ever took place or existed between the plaintiff and defendant. If there was no marriage, or none is shown by proofs, then, as a matter of course, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed. * * *

There is much controversy as to what constitutes a valid common-law marriage. It always has been and still is a doubtful question in England. Reg. v. Millis, 10 Clark & F. 534; 1 Bish. Mar. & Div. §§ 270, 278. In the American states where such marriages have been recognized and held valid there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland some ceremony or celebration seems to be necessary to a valid common-law marriage, and in most or all of these states it has been questioned whether or not the statutes have not superseded common-law marriages, and that a marriage, to be valid, must be in conformity with the statutes. State v. Samuel, 19 N. C. 177; Grisham v. State, 2 Yerg. 589; Com. v. Munson, 127 Mass. 459, 34 Am. Rep. 411; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Denison v. Denison, 35 Md. 361, 379.

The rule is fully as liberal, if not more so, in New York and Pennsylvania, than it is in any of the other states. In New York

it has been held that no religious form or ceremony of any kind is essential to validity of the marriage. All that is requisite in that state is that the parties should be capable of contracting, and that they should actually contract to be man and wife; but such contract must be proved to the satisfaction of the court, and may be proved by the wife, when her testimony is corroborated and entitled to credit. Bissell v. Bissell, 55 Barb. 325; Van Tuyl v. Van Tuyl, 57 Barb. 235.

In Pennsylvania it has been decided that "marriage is, in law, a civil contract, not requiring any particular form of solemnization before officers of church or state, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties, or by witnesses present when it is made. Therefore, when the evidence of the contract was the declaration of the wife that, 'about 31 years since, she went to the house of A. S., to live with and keep house for him, under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together,' it was held that there was not proof of a marriage in fact." Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198.

I have been unable to find any case in which the courts of Virginia or of this state have ever held that a common-law marriage was valid. This is certainly persuasive evidence that such marriages have never been regarded as valid in these states.

Referring to the facts in this case, it does not seem to me that they are sufficient to prove a marriage according to the liberal rule adopted in the states of New York and Pennsylvania. Before any pretense of a legal marriage, the parties had lived and cohabited together for over 12 years. It is a well-settled rule of law everywhere that a cohabitation, illicit in its origin, is presumed to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and must satisfactorily prove that it had been changed into that of actual matrimony by mutual consent. Foster v. Hawley, 8 Hun, 68; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, and 1 N. W. 98; Appeal of Reading F. Ins. & Trust Co., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448; Hantz v. Sealy, 6 Bin. (Pa.) 405.

In the case before us the testimony of the pretended wife is contradictory, and so unsatisfactory as to render it extremely improbable and unreliable. But, if we admit its credibility, it falls far short of establishing any actual contract of marriage. It simply proves the continuance of the illicit association and cohabitation which is shown to have existed between the parties, without interruption, for over

12 years before the alleged marriage. The plaintiff simply says that she and the defendant did not deem it necessary to marry again, as they considered their former illegal marriage legal, and that they thereafter lived together just as they had been doing, as man and wife. There is no semblance of a change in their relations or actual agreement of marriage shown here, and this is all the evidence we have of the alleged marriage.

But, in the view this court takes of the law, it is unnecessary to rest our decision upon the conclusion just indicated. We think our statute has wholly superseded the common law, and in effect, if not in express terms, renders invalid all attempted marriages contracted in this state which have not been solemnized in compliance with its provisions. The statute in force in this state in 1873, when it is alleged the marriage now in question occurred, is embraced in chapter 63, Code 1868. The first section of said chapter provides for the issuance of marriage licenses; the third, fourth, and fifth sections, by whom, and the manner in which, marriages may be solemnized; and the sixth section is as follows: "Every marriage in this state shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage; nor shall any marriage celebrated within this state between the seventeenth day of April, 1861, and the first day of January, 1866, be void by reason of the same having been solemnized without such license."

Statutes regulating marriages have generally and properly been construed as directory, and not mandatory. Since marriage is a natural right, and one that existed independent of statutes, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. Consequently, the doctrine has become established, as a general rule, that a marriage good at common law will be held valid, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity. This rule, however is not universal. 1 Bish. Mar. & Div. § 283. It seems to me, therefore, that when the terms of the statute are such that they cannot be made effective, to the extent of giving each and all of them some reasonable operation, without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that "every marriage in this state *shall* be under a license, and be solemnized in the manner herein provided." It is possible that these words, standing alone,

should, under the general rule just stated, be interpreted as merely directory. But the statute does not stop here. It qualifies these words by provisions which would be wholly useless and unnecessary if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not *"be deemed or adjudged void"* because the person solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not *"be void"* because they were solemnized without a license.

These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriages had in this state, contrary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made. The introduction of the exemptions is necessary, exclusive of all other independent, extrinsic exceptions. The maxim is clear, "expressum facit cessare tacitum," —affirmative specification excludes implication. Potter's Dwar. St. 221; Cates v. Knight, 3 Term R. 442.

It is therefore my conclusion that no marriage, or attempted marriage, if it took place in this state, can be held valid here, unless it has been shown to have been solemnized according to our statutes. It is very certain, it seems to me, that no attempted or pretended marriage can be held valid when it affirmatively appears that it has not been so solemnized. There is no pretense that the pretended marriage sought to be established in this case was solemnized in any respect according to the requirement of the statute. I am therefore of the opinion that the plaintiff and defendant in this case never were legally married, and that the plaintiff is not entitled to the relief prayed in her bill. I have come to this conclusion with less regret because, by the express command of our statute, "the issue of marriage deemed null in law, or dissolved by a court, shall nevertheless be legitimate." Section 7, c. 78, Code, p. 485; Stones v. Keeling, 5 Call (Va.) 143; Rice v. Efford, 3 Hen. & M. (Va.) 228.

For the reasons stated, the decree of the circuit court must be reversed, and the plaintiff's bill dismissed.

JOHNSON, GREEN, and WOODS, JJ., concurred.[3]

[3] The question of whether statutes setting forth a formal procedure for marriages are to be construed as mandatory, or as merely directory, has been litigated in practically all the states. The statutes vary, of course, in their language, but the courts of different states have reached different conclusions where there was no substantial difference in language. At present, there are approximately thirty states in which a marriage without any formal ceremony, and without compliance with statutory provisions, is valid. The decisions are collected in notes in 39 A. L. R. 528, and L. R. A. 1915E, 8. The states differ somewhat in their decisions as to just what are the necessary elements of such a marriage. Those differences will be considered hereinafter.

See, for a case involving the law of several different states upon the ques-

HULETT v. CAREY.

Supreme Court of Minnesota, 1896. 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419.

MITCHELL, J. Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 13, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal property, pursuant to the statutes in such case made and provided. On September 13, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside and declared not to be the last will and testament of the deceased. In this petition she alleged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage.

Both petitions alleged, and it is an admitted fact, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material, on which it was asked that the probate of the will be vacated, was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892: "Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy." The probate court decided adversely to the petitioner, and denied both

tion of common-law marriages, Travers v. Reinhardt, 205 U. S. 423, 27 S. Ct. 563, 51 L. Ed. 865 (1907).

her petitions, whereupon she appealed to the district court in both cases.

Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. * * *

The second finding of fact in each case was to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on the 7th of January, 1892 (the date of the execution of the marriage contract), and on the 25th of July, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on the 7th of January, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc.; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals.

The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged.

Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in verba de præsenti, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law.

The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of

marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract jure gentium, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made per verba de præsenti, and remains without cohabitation, or if made per verba de futuro, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. p. 87; 2 Greenl. Ev. § 460; 1 Bish. Mar. & Div. §§ 218, 227–229. The maxim of the civil law was "Consensus non concubitus facit matrimonium." The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. §§ 239, 313, 315, 317. See, also, the leading case of Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject.

An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. Dalrymple v. Dalrymple, supra. The only two cases which we have found in which anything to the contrary was actually decided are Reg. v. Millis, 10 Clark & F. 534, and Jewell v. Jewell, 1 How. 219, 11 L. Ed. 108, the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country.

Counsel for appellants contend, however, that the law is otherwise in this state; citing State v. Worthingham, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, per verba de præsenti, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents"; citing Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed per verba de præsenti to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely stating a proven or admitted fact in that particular case, while in others the

contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage.

In State v. Worthingham, supra, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it.

The case of Hutchins v. Kimmell, supra, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife.

Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Id., 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations."

In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do. * * *

The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; as, for example, as to the power of the probate court to set aside the probate of a will. In the appeal from the judgment setting aside to the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed. In the other appeal the judgment setting aside the probate of the will, and adjudging such will to be of no force or effect, is reversed.[4]

[4] In Great Northern Railway Co. v. Johnson, 254 F. 683, 166 C. C. A. 181 (1918), a valid marriage was held to be effected by a written agreement sent by letter from a man in Minnesota to a woman in Missouri and there accepted.

In Ex Parte Suzanna (D. C.) 295 F. 713 (1924), it was held that a proxy marriage, the woman being in Portugal and the man in Pennsylvania, was a

CHENEY v. ARNOLD.

Court of Appeals of New York, 1857. 15 N. Y. 345, 69 Am. Dec. 609.

The action was by husband and wife, to recover a farm claimed by the plaintiffs, in the right of the wife, as only child and heir at law of one Charles Harris. * * * A verdict was rendered for the defendant, and the judgment thereupon affirmed by the Supreme Court at general term. * * *

DENIO, C. J. The plaintiff, Phila Cheney, claims to be the daughter of Charles Harris, who is admitted to have been seized of the premises, claimed in this action, and she seeks to recover as his heir. The defendant claims under a conveyance from her mother, Betsey Pike, formerly Betsey Harris; and he insists that the plaintiff is not the legitimate daughter of Charles Harris and cannot therefore inherit from him, though it is not denied that she is his natural daughter.

Upon the question of the plaintiff's legitimacy there was no room for controversy about the facts. It was proved by the plaintiff's own witness, Betsey Pike, that, when her daughter, the plaintiff, was born, she had not been married to Charles Harris, the plaintiff's father. She swore, however, that there was a mutual engagement between them to be married to each other at some future time, and that after such engagement the plaintiff was begotten, and that their marriage was actually celebrated a few months after the plaintiff's birth. There was no cohabitation between them as husband and wife; they did not hold themselves out, and they were not recognized by their relatives or their

good Pennsylvania common-law marriage, and entitled the woman to admission to the United States as the man's wife. The court cites and relies upon an article by Prof. E. G. Lorenzen in 32 Harv. L. Rev. 473. But see United States ex rel. Aznar v. Commissioner of Immigration (D. C.) 298 F. 103 (1924), where the court treated such a marriage as a valid foreign marriage, and therefore good in this country.

The question of whether consent must be followed by cohabitation, in order to make a valid informal marriage, has been, as was said by the court in the principal case, the subject of many dicta but few decisions. In Herd v. Herd, 194 Ala. 613, 69 So. 885, L. R. A. 1916B, 1243 (1915), and in Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1 (with a note on the subject at page 33), Ann. Cas. 1915C, 1011 (1913), it is held that consent without matrimonial cohabitation does not constitute a valid marriage. In the latter case, and also in Randazzo v. Randazzo (Mo. App.) 236 S. W. 1061 (1922), it is held, contra to the principal case of Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419 (1896), that merely secretly living together is not sufficient, but that the reputation of marriage must be established. See 33 A. L. R. 27.

Habit and reputation of marriage create a presumption of a valid marriage, even where a ceremonial marriage is required, and neither record nor eyewitnesses need ordinarily be produced to prove the fact of marriage in a civil case. Wigmore on Evidence, § 2082, ff; Travers v. Reinhardt, 205 U. S. 423, 27 S. Ct. 563, 51 L. Ed. 865 (1907). In certain types of civil cases, such as criminal conversation, and in criminal cases, especially bigamy, there is a conflict of authority as to whether marriage can be proved merely by habit and reputation. See Wigmore, op. cit. § 2085.

acquaintances, as married persons until the formal marriage. The plaintiff was, however, brought up by them and always recognized as their daughter. The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the judge consequently committed an error in submitting the question to the jury whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character; as he maintains that in either case they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to became husband and wife in præsenti, but there was an agreement to be married in futuro, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married and the plaintiff is legitimate, otherwise she is not.

There is a dictum by Judge Cowen, in Starr v. Peck, 1 Hill, 274, which fully sustains the plaintiff's position; but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties; and the verdict affirmed the existence of a marriage. There was no evidence of a contract, present or future, and it was as easy for the jury to find the one as the other. What was said by the learned judge as to a contract per verba de futuro was obiter. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: "If the contract be made per verba de præsenti and remains without cohabitation, or if made per verba de futuro and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary." 2 Com. (2d Ed.) 86. Blackstone too says that in cases of cohabitation, contracts per verba de futuro were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate them in facie ecclesiæ. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us marriage is simply a civil contract, differing, it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent executory or executed. If executed, that is, if the parties agree eo instanti to take each other for husband and wife, it is ipsum matrimonium. If executory in its terms it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it con-

fessedly does furnish the basis of an action for damages. If it were like some other common law contracts, an action in the nature of a bill in equity might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically, and we have no tribunals corresponding with the English ecclesiastical courts, which did formerly exercise such a jurisdiction. Burtis v. Burtis, Hopk. Ch. 557, 14 Am. Dec. 563. Our courts have all the jurisdiction of the English common law and equity courts which has not been denied them by the legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that if parties agree to marry and one of them refuse to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties or confer any rights upon the issue of such connection. * * * It follows that the doctrine of the canon law, that a contract of marriage per verba de futuro, followed by carnal intercourse, was a valid marriage, did not become the law of this state by force of our adoption of the common law of England, for it was not a part of that common law. * * *

Judgment affirmed.[5]

FEEHLEY v. FEEHLEY.

Court of Appeals of Maryland, 1916. 129 Md. 565, 99 A. 663, L. R. A. 1917C, 1017.

Suit by Mary K. Feehley against Timothy L. Feehley. From a decree for plaintiff, defendant appeals. Decree affirmed.

URNER, J. The appellant and appellee were married in November, 1891. A daughter was born as a result of their union. In September, 1896, they were divorced. Fifteen years later, at the instance of the daughter, then grown to young womanhood, they were reunited. There were intervening marriages by both parties which were dissolved by judicial decree, the appellant having had one, and the appellee two, such intermediate experiences. The reunion occurred in September, 1915. In October of the following year, the appellee filed

[5] Accord: Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156 (1920). See 1 Bishop, Marriage, Divorce, and Separation, § 370 et seq., for a criticism of the principal case.

her bill of complaint against the appellant for alimony, and for the division and adjustment of their joint property interests, on the ground that she had been forced from their home by his cruelty and vicious conduct. The main defense to the suit is based upon the theory that the parties were not lawfully remarried, and therefore do not sustain the relationship upon which the right to maintain the suit is predicated.

For some months prior to the time when the remarriage is alleged by the bill to have occurred, the appellant was living as a boarder at the home of the appellee and of their daughter. The question of their being married again had been under consideration, and the appellant was inclined to the opinion that no ceremony was necessary, inasmuch as they were both Catholics, and in the view of their church the original marriage was still subsisting. On the occasion, however, of a call at the home by the priest of the parish, a ceremony was performed upon whose nature and effect depends, in large measure, the decision of the present controversy. It is to be determined whether a marriage was then celebrated with religious rites, and, if so, whether it should be held to be valid notwithstanding the conceded fact that no license for the marriage had been obtained as required by law.

The appellee and her daughter both testified that on the occasion in question a wedding ceremony was performed in full accordance with the ritual of the Catholic Church, that the priest placed his stole about his neck, had some holy water brought and a ring produced, and, taking a book from his pocket, read the service and solemnized the marriage in the customary form, including the usual questions and answers as to the mutual consent of the parties, and concluded with a blessing and the declaration that they were now husband and wife. The appellant testified that the ceremony was not a marriage, but simply a blessing. He stated that something in Latin was said by the priest and that holy water and a ring were used. The testimony of the priest was to the effect that he could not remarry the parties because his church does not recognize a divorce, and therefore the first marriage, which was solemnized in the church, was to be regarded as being still in force, but that he pronounced a blessing upon their agreement to resume the relations of matrimony. He said that he could not recall exactly what he did on that occasion. In answer to the question as to what it was his intention to do, he said, "Just to have them become husband and wife." He thought that he may have put on his stole, and that a ring was in fact used when they were asked to renew their consent, but he could not recall whether or not holy water was brought and applied.

It is the settled law of this state that "some religious ceremony" must be "superadded to the civil contract" in order that a marriage may be valid. "The law, however, does not prescribe the form, nor according to the rites of what church, the marriage shall be celebrated." Denison v. Denison, 35 Md. 380. Upon the evidence in the record before us, there can be no doubt that there was a ceremony in connection with the event now under inquiry, and that it was religious in its

character. It was conducted by a duly ordained minister in the formal exercise of his sacred office. It was unquestionably intended to be an essential feature of the new marital agreement into which the parties were entering. The priest, and the man and woman before him, understood that he was officiating there in order that they might live together in lawful wedlock. The words and emblems he employed were strictly appropriate to that object. The sole purpose of his presence and ministration was to give religious sanction to their reunion. In our judgment that result was effectually accomplished, and the validity of the remarriage is not open to question on the ground that it was not solemnized by a religious ceremony.

The contention that the failure to secure a license rendered the marriage void must likewise be overruled. While the statute provides that no persons within the state "shall be joined in marriage until a license shall have been obtained from the clerk of the circuit court for the county in which the marriage is to be performed, or if in Baltimore City, from the clerk of the court of common pleas," or unless banns shall have been published as therein described, or except in the case of marriages according to the ceremony used by the Society of Quakers, and while punishment by fine is directed to be imposed upon ministers and others who marry persons without a license, there is no purpose expressed in the statute that a marriage otherwise validly contracted and celebrated shall be void if the prescribed license shall not have been procured. Code, art. 62, §§ 4, 11. On the contrary, there is an implied recognition of the efficacy of marriages solemnized without a license in the provision that a minister who shall "marry" persons in the absence of such official authorization shall be subjected to the stated penalty. The requirement of a license preliminary to marriage is wholly of statutory origin.

At common law, according to the decisions of this court, a religious ceremony, in celebration of the civil contract, was sufficient to make the marriage lawful. Denison v. Denison, supra; Richardson v. Smith, 80 Md. 93, 30 A. 568; Jackson v. Jackson, 80 Md. 187, 30 A. 752. In view of the important considerations of morality and legitimacy involved, it is manifestly a sound and just rule of construction that statutes providing for marriage licenses are not held to have the effect of nullifying, for noncompliance with their terms, a marriage valid at common law, unless such an intention is plainly disclosed. This salutary principle has been applied in numerous decisions. There are differences of judicial opinion in various jurisdictions as to what are the essential features of a marriage under the rules of the common law, but the courts are generally in accord upon the proposition that a statutory provision for license to marry should not be regarded as mandatory, and vital to the validity of a marriage, in the absence of a clear indication of a legislative purpose that it should be so construed. * * *

The regulative purposes of the license statute are useful and important, but they are sought to be enforced by pecuniary penalties pro-

nounced against those officiating at unlicensed marriages, and not by the radical process of rendering void and immoral a matrimonial union otherwise validly contracted and solemnized. In order to obviate such a result, it has been decided by this court that even the statutory provision expressly declaring void any marriage contracted within the prohibited degrees of relationship did not have the effect of making absolutely void a marriage of uncle and niece, contrary to its terms, but rendered the marriage voidable only by judicial decree passed during the lifetime of the parties. Harrison v. Harrison, 22 Md. 468, 85 Am. Dec. 658. That case was said by Chief Judge Boyd, in Dimpfel v. Wilson, 107 Md. 337, 68 A. 564, 13 L. R. A. (N. S.) 1180, 15 Ann. Cas. 753, to show the "anxiety of our predecessors to protect innocent issue from being pronounced illegitimate, by not being willing to declare such marriage void ab initio, notwithstanding the language used in the statute, when other parts of the statute and the circumstances permitted a construction which made them only voidable." The ruling in Harrison v. Harrison was followed in the very recent case of Fensterwald v. Burk, 129 Md. 131, 98 A. 358. The problem of statutory construction now presented is simpler than the one to which those cases referred, and it is readily solved upon the theory that the act does not profess to make the validity of a marriage depend upon the procurement of a license. The principle that such provisions are directory only has been adopted in jurisdictions where a religious ceremony is not regarded as an essential element of a marriage according to the common law, and it would seem that in a state like our own, where this additional sanction and safeguard is required, there is even stronger reason for the rule that the validity of such a marriage should be sustained.

The decree appealed from was passed in pursuance of a decision that the marriage was valid, and that a sufficient ground for the allowance of alimony and the adjustment of the property rights of the parties had been shown by the proof. No question has been raised on appeal as to the propriety of the decree with respect to the affirmative relief it grants, except upon the theory that the plaintiff and defendant are not legally married. Upon the facts and the law we are of the opinion that the decree in all respects is proper and just.

Decree affirmed, with costs.[6]

[6] The court, in the omitted portion of the opinion, cited numerous authorities in support of its position, but most of them are dicta of courts in jurisdictions where a common-law marriage is valid.

In accord with Feehley v. Feehley, 129 Md. 565, 99 A. 663, L. R. A. 1917C, 1017 (1916), see State v. Parker, 106 N. C. 711, 11 S. E. 517 (1890). See, also, Martin v. Otis, 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340 (1919).

In Offield v. Davis, 100 Va. 250, 40 S. E. 910 (1902), however, where there was neither license nor ceremony, the court held there was no marriage, and said there could be none without a license. See, also, Travers v. Reinhardt, 205 U.

AN ACT [7]

Relating to and Regulating Marriage and Marriage Licenses and to Promote Uniformity Between the States in Reference Thereto.

[Defining the essential elements of a marriage contract; prescribing the manner of contracting marriages; requiring the consent of parents or guardians of minors; requiring a marriage license in all cases; providing for the issuance thereof, the recording thereof, the form thereof, and the form, delivery, and recording of the certificate of marriage; imposing penalties for solemnizing marriages without a license, or without authority of law, for refusing to return or record the certificate of marriage, for refusal or neglect by any marriage license clerk of the duties prescribed by this act; providing that a certified copy of the record shall be prima facie evidence of any marriage; prohibiting common-law marriages; providing for the legitimation of children by ex post facto marriages; requiring returns by marriage license clerks to the * * * of this state; fixing the fees of marriage license clerks; and repealing, consolidating, and extending existing laws in relation to these subjects.]

S. 423, 27 S. Ct. 563, 51 L. Ed. 865 (1907), where the court assumed, for the purposes of the case before it, that such was the law of Virginia.

In the jurisdictions where completely informal marriages are invalid, the tendency of the courts seems to be to hold that the ceremony itself is the only absolute essential to validity. The fact that the consent of parents is not obtained, when the statute requires such consent as a prerequisite to the issuance of the license, does not affect the validity of the marriage. Payne v. Payne, 54 App. D. C. 149, 295 F. 970 (1924). Nor does the fact that a certificate of intention was not filed, according to the statute, Gardiner v. Inhabitants of Manchester, 88 Me. 249, 33 A. 990 (1896); nor the fact that the license was obtained by fraud, such as a misrepresentation of age, Payne v. Payne, 54 App. D. C. 149, 295 F. 970 (1924).

On the question of the effect of noncompliance with a statute requiring a physical examination before marriage, see Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683 (1920).

In a number of states, the statutes provide that a marriage ceremony performed by a person not authorized to do so shall be valid if the parties (in some states, if either of the parties) believe such person to be authorized.

7 This proposed title to the "Uniform Marriage and Marriage License Act" indicates the scope of the act. See Uniform Laws Annotated, vol. 9, p. 189, ff, for the full text of the act.

SECTION 2.—GROUNDS FOR ANNULMENT[8]

(A) NONAGE

BEGGS v. STATE.

Supreme Court of Alabama, 1876. 55 Ala. 108.

BRICKELL, C. J.[9] * * * 3. The indispensable evidence to support a prosecution for bigamy is that the defendant had "a former wife or husband living"; a subsisting, valid prior marriage, subjecting to its duties, and conferring its rights. If the first marriage is void, the offense has not been committed. 3 Whart. Am. Cr. Law, § 2628; 3 Greenl. Ev. § 208. But, if it is merely voidable, contracted under disabilities or impediments, which render it capable of confirmation or avoidance as the party may elect, it is a marriage in fact, until avoided, and a second marriage while it remains a marriage in fact is criminal. 3 Whart. Am. Cr. Law, § 2628; 1 East, 466, § 2. By the common law, no persons were capable of binding themselves in marriage, until they had arrived at the age of consent, which in males was fixed at fourteen, and in females at twelve. Marriage before that age was voidable at the election of either party, on arriving at the age of consent, if either of the parties was under that age when the contract was made. 2 Kent, 43; Schouler's Dom. Rel. 32; 1 Bish. Mar. & Div. §§ 149, 150. The statute of this state is: "A male under the age of seventeen, and a female under the age of fourteen years, are incapable of contracting marriage." R. C. § 2333. The evidence tended to show that the defendant was under the age of seventeen when the first marriage was contracted. The charge requested was, that if the first marriage was contracted while the defendant was under seventeen, he was not guilty. The charge assumes, as matter of law, that the first marriage was void. It was refused by the Circuit Court; and whether the first marriage was void, or voidable, is the precise question we must determine.

The statute to which we have referred, fixing the age of consent requisite to a valid marriage, or a marriage binding on the parties, is part of a title of the Code devoted to "Domestic Relations," and of an article devoted especially to "Marriage." The first, second and fourth sections of the article are confined to incestuous mar-

[8] Since the jurisdiction to annul marriages was in the ecclesiastical courts in England, American courts of equity, before statutes were passed covering the subject, held that they had no power to annul voidable marriages. Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563 (1825), is perhaps the leading case. See, also, Mattison v. Mattison, 1 Strob. Eq. (S. C.) 387, 47 Am. Dec. 541 (1847); Anonymous, 24 N. J. Eq. 19 (1873); Waymire v. Jetmore, 22 Ohio St. 271 (1872); Lyndon v. Lyndon, 69 Ill. 43 (1873). As to the jurisdiction of American courts of equity to judicially declare the nullity of void marriages, see note 11, p. 577, infra.

[9] Statement of facts omitted.

riages, which are in express terms prohibited. The third is the section fixing the age of consent, and is without words of prohibition. It is simply definitive of capacity to contract marriage. The fifth, sixth, seventh, eighth, ninth, tenth, and eleventh sections, relate to the solemnization of marriage, the mode of obtaining authority for, and the preservation of legal evidence of it. The twelfth, thirteenth, fourteenth and fifteenth impose penalties for a violation of the preceding sections, by those having authority to solemnize; and on the probate judge for issuing license to solemnize, or not keeping the proper record of license and solemnization, in violation of the duty imposed on him. There is no penalty imposed on persons not of the requisite age, for contracting marriage, or on any person for contracting marriage, in any other than the mode prescribed. A marriage without license from the probate judge, without solemnization by any person authorized by the statute to solemnize it—a marriage merely by the consent of the parties—followed by cohabitation, is valid. The parties stand to each other in the relation of husband and wife, having all the rights, and subject to all the duties, flowing from a marriage in strict conformity to the statute. Campbell v. Gullatt, 43 Ala. 57.

When the different parts of this article are compared, the intention of the legislature seems unmistakable. Incestuous marriages are prohibited—are void ab initio; no subsequent acts of the parties can affirm, or impart to them validity. Not only are they prohibited, but those entering into them incur severe penalties. R. C. § 3601. There is no prohibition of the union of parties not of the requisite age, and no penalty imposed on them for forming the union. The incestuous marriage contravenes the voice of nature, degrades the family, offends decency and morals, and is absolutely interdicted. A marriage within the age of consent may be indiscreet, may disturb the peace of families, and may subject youth and inexperience to the arts of the cunning and unscrupulous; but it is wanting in the vicious and corrupting properties of the incestuous connection. The change in the terms of the statute in reference to these marriages, and the very nature of the two, forbid an interpretation that would place them in the same condition. If it had been intended to declare void the marriage of a person not of the requisite age, the intention would have been expressed in terms equivalent to those employed when incestuous marriages are prohibited. Goodwin v. Thompson, 2 G. Greene (Iowa) 329; Koonce v. Wallace, 52 N. C. 194. The statute serves the purpose of its enactment, when construed as operating merely an enlargement of the age of consent, from that fixed by the common law—of twelve in females, and fourteen in males—to fourteen in females and seventeen in males. The marriage between persons not of the statutory age is, as was the marriage between persons not of the age of consent at common law, imperfect, becoming perfect only by affirmance when the requisite age is obtained.

Until disaffirmance, it is a marriage in fact, and the second marriage of either party is bigamy.

The case of Shafher v. State, 20 Ohio, 1, is opposed to this view, and opposed, as we think, to the great weight of authority. The general rule prevailing in this country is, that marriages, valid at common law, although not in conformity to statutory regulations, are valid, unless the statutes are prohibitory, or in restraint of them. Campbell v. Gullatt, 43 Ala. 57; 2 Green. Ev. § 460; Parton v. Hervey, 1 Gray (Mass.) 119. It would be violative of this principle, and of the intent of the legislature, to construe the statute under consideration as absolutely avoiding the marriage of a person not of the requisite age. We may remark, that if, on arriving at the age of seventeen, the female being of the age of fourteen years—or, if she was not then of the age of fourteen years, when she reached that age—either party disaffirmed the first marriage, it was thereby avoided, and the second marriage, if subsequent to such disaffirmance, was not in violation of law. No question was raised in the court below as to the affirmance or disaffirmance of the first marriage, and it would not be proper to say more in reference to it.

The charge requested did not assert a correct principle, and was properly refused. For the error we have pointed out, let the judgment be reversed, and the cause remanded. The defendant must remain in custody, until discharged by due course of law.[10]

[10] The great weight of authority is in accord. See State v. Sellers, 140 S. C. 66, 134 S. E. 873 (1926), and comment thereon in 36 Yale L. J. 426.

At common law, if either party to the marriage was under the age of consent, either party could disaffirm the marriage when the one under age reached the age of consent, and no judicial annulment was necessary. 1 Bl. Comm. 436. Annulment, either with or without a judicial decree, rendered the marriage void from the beginning. 1 Bishop on Marriage, Divorce, and Separation, § 259. In some states the statutes provide that the marriage shall be void only from the time it is judicially so declared. See, e. g., New York Domestic Relations Law (Consol. Laws, c. 14) § 7.

There is very little American authority upon the question of annulment by the parties, or one of them, without a decree. In many states the statutes are so construed as to require a judicial annulment. See, e. g., Owen v. Coffey, 201 Ala. 531, 78 So. 885 (1918); State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. Rep. 358 (1899); Wolf v. Wolf, 111 Misc. Rep. 391, 181 N. Y. S. 368 (1920). The statutes are construed as permitting judicial annulment before the age of consent is reached. Owen v. Coffey, supra, State ex rel. Scott v. Lowell, supra. See, contra, Palmer v. Palmer, 79 N. J. Eq. 496, 82 A. 358 (1912); Id. (N. J. Ch.) 80 A. 486 (1911).

See People v. Slack, 15 Mich. 193 (1867), to the effect that, under the Michigan statute, the marriage could not be annulled by the party who was above the age of consent at the time the marriage took place.

At common law, a suit to annul a marriage cannot be prosecuted by the parents of one of the parties, without making their child a party to the suit. Wood v. Baker, 43 Misc. Rep. 310, 88 N. Y. S. 854 (1904). As to the necessity of an infant party to an annulment proceeding being represented by a guardian ad litem or next friend, see 17 A. L. R. 900.

At common law, where either party to the marriage is under the age of seven, the marriage is absolutely void. 1 Bl. Comm. 436; Swinburne, Spousals, 20, 21: 2 Burn. Ecc. Law 434, a.

(B) INSANITY

SOTHERN et al. v. UNITED STATES (MORRIS, Intervener).

District Court of the United States, E. D. Arkansas, W. D. 1926. 12 F.(2d) 936.

At Law. Action by Dorothy Sothern and others against the United States, with Adele Wagnon Morris as intervener. On demurrer of intervener to answer to petition of intervention. Overruled.

This is an action against the United States to recover on a policy of insurance, issued to one Robert Earl Gott, a soldier during the World War, under the War Risk Insurance Act of Congress (Comp. St. § 514a et seq.). The insurance in the original policy had been made payable to his father, who, five years after the death of his son, died, leaving the plaintiffs, two sisters and a brother of the deceased soldier, surviving him.

The United States, in its answer, among other allegations, states that prior to his death the insured changed the beneficiary in the original policy to his wife, now known as Adele Wagnon Morris, and asks that she be made a party to this suit. Thereupon Mrs. Morris filed an intervention, claiming that on April 20, 1919, she was married to the deceased insured soldier, and at the time of his death she was his lawful wife, and the beneficiary under the policy of insurance sued on, and entitled to the proceeds thereof.

To this intervention the plaintiffs filed an answer, setting up as one of the defenses that, at the time of the alleged marriage of the intervener with the deceased soldier, Robert Earl Gott, he was insane, and for this reason the alleged marriage was absolutely void. To this plea the intervener demurred.

TRIEBER, District Judge (after stating the facts as above). The only question to be determined on the demurrer is whether a marriage contracted by a lunatic or insane person is wholly void, so that it may be attacked collaterally, or only voidable, and valid until set aside in a direct proceeding instituted for that purpose. 1.

Marriage is now recognized by all the American as well as the English courts as a civil contract. Meister v. Moore, 96 U. S. 76, 78, 24 L. Ed. 826; Reynolds v. United States, 98 U. S. 145, 165, 25 L. Ed. 244; 38 C. J. 1272; 18 R. C. L. 383, and authorities there cited. Being a civil contract, it is subject to the same rules of law governing all civil contracts.

While there is some conflict among the state courts whether a civil contract by a lunatic is absolutely void, or voidable, the courts of the United States have uniformly held a contract of a lunatic or insane person is wholly void, and subject to collateral attack. The leading case on that subject is Dexter v. Hall, 82 U. S. (15 Wall.) 9, 26, 21 L. Ed.

73. Mr. Justice Strong delivered the unanimous opinion of the court, in which he carefully reviewed the English and American authorities.

In that case Hall, a lunatic, had executed a power of attorney, authorizing the attorney to sell certain real estate owned by him. The attorney sold the same under the power, and by mesne conveyances Dexter became the owner of the premises. After the decease of the lunatic, his heirs instituted an action of ejectment against Dexter, who offered evidence to prove that he was an innocent purchaser, for a valuable consideration, without knowledge of Hall's insanity, which was by the trial court excluded. Nor does it appear that Hall had been adjudicated an insane person, although he was at the time of the execution of the power of attorney and until his death an inmate of an insane asylum.

The trial court had charged the jury: "If at the time Hall executed the power in question, he was insane, and his insanity was general, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of Hall than if he was dead at the time of its execution"—and this was affirmed.

The same conclusion was reached by the Circuit Court of Appeals for this circuit in Plaster v. Rigney, 97 F. 12, 38 C. C. A. 25, and by Circuit Judge McCrary in Edwards v. Davenport (C. C.) 20 F. 756. See, also, Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Brewster v. Weston, 235 Mass. 14, 126 N. E. 271; First Nat. Bank v. Tribble, 155 Ark. 264, 274, 244 S. W. 33.

That the same rule applies to marriages has been uniformly held by all courts, which hold that civil contracts by insane persons are absolutely void. Numerous authorities to that effect will be found in the notes in 38 C. J. 1285, and 18 R. C. L. 404, and need not be cited herein.

Schouler (16th Ed. 1921) on Marriage and Divorce, Separation and Domestic Relations, states the law to be (volume 2, p. 1574, § 1107):

"The marriage of one mentally incompetent is void, and according to the weight of authority, where for want of the requisite mental capacity on the part of one of the parties there has been no consent to the marriage contract, the purported marriage is an absolute nullity, and will be so decreed in any court and in any proceeding where the question may arise, whether during the lifetime of both of the parties or after the death of either of them. In some states, however, statutes have been passed designed to render marriages of this kind free from attack, except in proceedings for annulment brought by or on behalf of one of the parties."

Of course, the authorities from states in which marriages of lunatics are by statute declared only voidable, are inapplicable, as there is no statute of Texas, where this marriage took place, to that effect. The

marriage being void, and not only voidable, is as if it had never taken place.

The demurrer is overruled.[11]

(C) RELATIONSHIP

BOWERS v. BOWERS.

Court of Errors of South Carolina, 1858. 10 Rich. Eq. 551, 73 Am. Dec. 99.

Edward Bowers died in the month of December in the year 1835, intestate. Shortly before his death a marriage ceremony was celebrated, in the town of Camden, between him and Elizabeth Jemima Graham, his niece, a brother's daughter.

In the bill filed in this case, by certain of his children, by a former marriage, for partition of a considerable estate left by him the ground was taken that this marriage between him and his niece was illegal

[11] Accord: Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130, 53 A. 1008 (1902); In re Newlin's Estate, 231 Pa. 312, 80 A. 255 (1911).

In Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393 (1902), it was held that the marriage was ratified by the parties living together during lucid intervals. Contra, see Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665 (1897). Observe that the rule of the state with reference to informal marriages would affect this question.

"It follows, as a necessary consequence, from these facts, that a marriage was null and void, from the beginning, by reason of the want of capacity in the plaintiff to contract, and has never since obtained any validity, because the plaintiff has never, since the return of her lucid interval, ratified or consummated it. * * *

"The fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party. The only question, then, is, To what court does the jurisdiction of such a case belong? There must be a tribunal existing with us competent to investigate such a charge, and to afford the requisite relief; and the power, I apprehend, must reside in this court, which has not only an exclusive jurisdiction over cases of lunacy, but over matrimonial causes. The Chancery powers, in case of lunacy, have never been applied to this case, because, there existed in England another and peculiar jurisdiction for the case; but, as such a jurisdiction does not exist here, the case seems to belong, incidentally, to the more general jurisdiction of this court over those subjects. Whatever civil authority existed in the ecclesiastical courts, touching this point, exists in this court, or it exists nowhere, and all direct judicial power over the case is extinguished; but that is hardly to be presumed." Kent, Chancellor, in Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343 (1820).

Cf. Pitcairn v. Pitcairn, 201 Pa. 368, 50 A. 963 (1902), where the court held there was no jurisdiction in equity to determine the validity of marriages, except as conferred by statute.

On the question of the extent of mental impairment necessary to affect marriage, see 28 A. L. R. 635.

Statutes, making the marriages of insane persons voidable, sometimes permit annulment only by the party whose mind was impaired. See 51 A. L. R. 852.

Mental incapacity, due to intoxication at the time of the marriage, is a ground for annulment. Montgomery v. U'Nertle, 143 Md. 200, 122 A. 357 (1923).

and void, by reason of their too close relationship, and that the latter was entitled to no part of his estate.

The circuit decree is as follows:

DUNKIN, Ch. Upon hearing the bill, and answers, and the argument of counsel; it is ordered, on motion of J. B. Kershaw, defendants' solicitor, that the report of the Commissioner on the accounts of Anderson Bowers, administrator, the advancements to the children of the intestate, Edward Bowers, and the settlement upon Jemima Turner be confirmed with the recommendations of the Commissioner.

Also ordered, that the administrator do pay out of the corpus of the estate in his hands the costs of this suit, and that he do pay over to the defendant, Elizabeth Jemima Robertson, late Bowers, one-third of the balance of the estate in his hands as administrator.

Also ordered, that the said administrator do pay over to the parties entitled, reserving the share of Jemima Turner, the remaining two-thirds of the balance of the estate in his hands, after payment of costs, first deducting therefrom such reasonable counsel fee as he may have paid his counsel for his services in this case.

It is also ordered, that the Commissioner do proceed to collect the securities in his hands, given for the purchase of the real estate of Edward Bowers, deceased, when they shall have become due, and pay over the same, one-third to said Elizabeth Jemima Robertson, late Bowers, and the remaining two-thirds to the children of the said Edward Bowers, deceased, except the share of Jemima Turner, which he shall retain until the further order of the Court.

The opinion of the Court was delivered by

DUNKIN, Ch. It is not questioned that the circuit decree of the Court of Equity is in conformity with the unanimous judgment of the Law Court of Appeals in State v. Barefoot, 2 Rich. 209. Barefoot was indicted for bigamy, and the conviction was sustained upon the determination of the Court, that the marriage of the defendant, with his aunt, was valid, by the laws of South Carolina. The avowed object of the appeal is to obtain the review and reversal of that judgment.

Marriage in the State of South Carolina has always been regarded as a merely civil contract. For any civil disability it may be treated as void by any judicial tribunal of the State. But the Court of Equity has no more authority over the subject than a Court of Law, and any attempt to exercise any greater or more extensive authority would be a simple act of usurpation. In Mattison v. Mattison, 1 Strob. Eq. 387, 47 Am. Dec. 541, it was determined unanimously by the Court of Errors that in a suit between the parties to the marriage seeking to have the same declared void, the Court of Equity had no jurisdiction. But in a suit between third persons, arising in the Court of Law, the validity of the same marriage, impeached

on account of an alleged civil disability, was fully examined, discussed and determined. The same power is familiarly exercised by the Court of Equity, as is illustrated by the case of Foster v. Means, Speer, Eq. 569, 42 Am. Dec. 332. All these inquiries relate, however, to some civil disability or other infirmity of that character in the alleged contract. But the incapacity in respect of proximity of relationship is a *canonical*, and *not* a *civil* disability. Neither the Court of Chancery in England, nor any of the Law Courts had cognizance of canonical disabilities. When Parliament thought proper to interfere, and, by the Stat. 5 and 6 Will. IV, c. 54, declared that all marriages, thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, should be absolutely void, then the objection came within the cognizance of the Courts of Common Law. 2 Steph. Com. 284. So when the Legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen, and enforced by the courts. But by this appeal the Court is invoked to recognize a principle which would not only declare void a marriage between uncle and niece, and of course bastardize their issue, but a marriage between a man and his wife's sister falls within the same category, and, if the canonical mode of computation of the Levitical degrees be adopted, a marriage between first cousins is equally prohibited. See note to 2 Steph. 284. On the other hand, extreme cases of unnatural alliances may be supposed at which the moral sense would be offended, but hitherto public sentiment, if not private morality, has repressed all such evils.* It is far better to leave to the Legislature the appropriate duty of defining and prohibiting such evils rather than arm the Court of Chancery with ecclesiastical powers on a subject of great delicacy and pervading interest.

But the proposition of the appellants could not be successfully maintained in any Court of Great Britain, ecclesiastical, or civil. Marriages within the Levitical degrees are not void, but only voidable. And, even in Doctors' Commons, you are not permitted to violate the sanctity of the tomb, and impeach for alleged canonical disability the validity of a nuptial contract which death has already dissolved. "Not only" (says a learned commentator) "are marriages, under these circumstances of disability, esteemed valid, until there be actual sentence of separation, but they are permanently valid, unless such sentence be given during the life of the parties. (For, after the death of either of them, the Courts of Common Law will not suffer the spiritual courts to declare such marriages to have been void.)" 2 Steph. Com. 280. Bury's Case, 5 Rep. 98.

* See the language of Chancellor Kent, in Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343 (1820), to the effect that marriages within the lineal line, and of brother and sister, are condemned generally by the laws of the civilized world, and therefore subject to annulment by a court of equity without any legislative enactment, but that the marriage of other relatives is valid unless expressly prohibited by the Legislature.

In the temporal Courts such marriages are held valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties. Shelf. Mar. and Div. 482. A marriage within the prohibited degrees, not avoided during the lifetime of both parties, confers the civil rights of marriage, such as the right of dower, right of administration, etc. Shelf. p. 179. And the author refers to Co. Litt. 33b, where it is said "that if a marriage be voidable in respect of consanguinity, affinity, etc., whereby the marriage might have been dissolved, yet if the husband die before any divorce, then for that it cannot now be avoided; this wife, de facto shall be endowed, for this is legitimum matrimonium quoad dotem."

So, in this case, it appeared that Edward Bowers, the husband, was dead, and the circuit decree properly adjudged to his widow, Elizabeth Jemima, one-third of his estate under the statute of distributions.

It is ordered and decreed that the appeal be dismissed. O'NEALL, WARDLAW, GLOVER and MUNRO, JJ., concurred.

Appeal dismissed.†

Voidable + not void -

BACK v. BACK.

Supreme Court of Iowa, 1910. 148 Iowa, 223, 125 N. W. 1009, L. R. A. 1916C, 752, Ann. Cas. 1912B, 1025.

Appeal from District Court, Ida County; Z. A. Church, Judge.

In a probate proceeding for the settlement of the estate of William Back, deceased, plaintiff alleged that she was the widow of the decedent, and asked an order directing the executor to turn over and deliver to her all his exempt personal property. Issue being joined as to wheth-

† The Levitical degrees are, of course, based upon the provisions of the Eighteenth chapter of Leviticus, verses 6 to 18. See, also, Leviticus, c. 20.

As to the methods of computing degrees of relationship, see 2 Pollock and Maitland, History of English Law, pp. 383–387.

The complicated system of impediments created by the churchmen, by their methods of computation of degrees, was simplified by the Statutes of 25 Henry VIII, c. 22, 28 Henry VIII, c. 7, and 32 Henry VIII, c. 38, which specifically set out the prohibited relationships, and gave to the temporal courts the power to restrain, by prohibition, the ecclesiastical courts from sanctioning any other impediments than those laid down in the statute. The jurisdiction to annul, however, was still left in the ecclesiastical courts.

In the American states generally, the relationships within which marriages are prohibited are specifically mentioned in the statutes. If the statute, as interpreted, makes such marriages void, they can be collaterally attacked, even after the death of the parties. Fearnow v. Jones, 34 Okl. 694, 126 P. 1015, L. R. A. 1916C, 720 (1912). But the mere statutory prohibition of such marriages does not make them void, but only voidable by decree. State v. Smith, 101 S. C. 293, 85 S. E. 958, Ann. Cas. 1917C, 149 (1915).

To the effect that, where the statute makes the marriage voidable on account of relationship, a court of equity will annul at the instance of either party, though the applicant may have knowingly and willfully entered into the same, see Martin v. Martin, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612 (1903). For nature of decree and penance imposed by the ecclesiastical court, see Blackmore and Thorpe v. Brider, 2 Phil. 359, at 362 (1816).

er the plaintiff was the widow of decedent, the court made a specific finding that plaintiff never was the legal wife of said decedent, and was never legally married to him, and therefore dismissed plaintiff's application and entered judgment for defendant for costs. From this judgment, the plaintiff appeals. Reversed.

McCLAIN, J. The facts out of which this controversy arises are not in dispute, being settled by stipulation of the parties appearing in the record. So far as we deem them material to a disposition of the case, they are as follows: In 1890 William Back, the decedent, married a widow, one Mrs. Dirke, who then had living a daughter by her former husband, which child is the plaintiff in this case. In 1900 the wife obtained a divorce from said William Back, and four years later he married the plaintiff. No children were born to William Back by his first marriage, but as a result of his marriage to plaintiff four children were born, all of whom survive him. About two years after the second marriage the divorced wife, mother of the plaintiff, died, and thereafter plaintiff and the decedent continued to live together as husband and wife until his death in 1906. The resistance of defendant to plaintiff's application as widow to have the exempt property set apart to her was on the ground that the marriage was incestuous and void under the provisions of Code, § 4936, which within the definition of "incest" includes marriage between a man and his wife's daughter, and prohibits such marriage. The trial court ruled throughout that, notwithstanding the termination by divorce of the marriage between decedent and plaintiff's mother before the marriage of decedent to this plaintiff, plaintiff continued to be decedent's wife's daughter within the statutory definition, and that the marriage to plaintiff was void in its inception and continued to be void after the death of plaintiff's mother and until the death of decedent, and that, therefore, plaintiff is not the widow of decedent. * * *

The provision of the statute relied upon for defendant as rendering plaintiff's marriage to decedent void is in full as follows: "If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father's son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person, being within the degree of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding ten years nor less than one year." Code, § 4936. It will be noticed this is a penal statute, the primary purpose of which is to provide a punishment for marrying a person related within specified degrees of consanguinity or affinity, or carnal knowledge between persons related in such degrees. It does not pur-

port to declare the status of persons who marry within the prohibited degrees, but by Code, § 3182, it is provided that a marriage may be annulled by a proceeding in court if it is between parties whose marriage is prohibited by law, and the only corresponding prohibition is that found in the criminal statute above quoted.

We shall not stop now to discuss the question whether a marriage between parties within the prohibited degrees of consanguinity or affinity is void or voidable only, but proceed at once to determine whether the marriage of plaintiff to decedent was within any of the prohibitions of Code, § 4936, and the determination of this question depends upon the construction of the words "wife's daughter" in that section. As the statute is penal, it should not be applied to any case which does not fall both within its letter and its spirit; and this rule of construction must evidently be followed for the purpose of determining the validity of a marriage, which it is contended is invalid because the parties to it are within the prohibited degrees of relationship. If the statute purported to be a definition only of degrees of relation within which marriage is prohibited, it might perhaps be argued with some plausibility that, as a man could not marry his wife's daughter while his wife was living and undivorced without committing bigamy, the object of including wife's daughter among those to whom a marriage is declared invalid was to prohibit such marriage after the death or divorce of the mother of such daughter; but, as the primary purpose of the statute apparent on its face is to punish carnal knowledge as between persons having the specified relationships as well as to punish marriage between them, it is quite evident that the enumeration of relationships is simply a method of stating more definitely what are the degrees of consanguinity or affinity rendering marriage or carnal knowledge between persons of the relationships named criminal. This is quite evident from the conclusion of the section which refers to the relationships named as being "degrees of consanguinity or affinity." Therefore, in determining the construction to be put upon the words "wife's daughter," we are required to determine their meaning as defining a degree of relationship by affinity. Now, it seems to be settled by the unanimous concurrence of authorities on the subject that relationship by affinity terminates with the termination of the marriage either by death or divorce which gave rise to the relationship of affinity between the parties. Blodget v. Brinsmaid, 9 Vt. 27; Noble v. State, 22 Ohio St. 541; State v. Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790; Wilson v. State, 100 Tenn. 596, 46 S. W. 451, 66 Am. St. Rep. 789; Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535; Pegues v. Baker, 110 Ala. 251, 17 So. 943; Tagert v. State, 143 Ala. 88, 39 So. 293, 111 Am. St. Rep. 17; Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144; Vannoy v. Givens, 23 N. J. Law, 201; 1 Bishop, New Crim. Procedure, § 901; 26 Cyc. 845. Of the cases cited, those from Texas, Alabama, and Ohio are directly in point as relating to a marriage between a man and the daughter of a former wife deceased or divorced, and the only

discrepancy between them is that in the Alabama cases a modification of the rule is insisted upon, by which the relationship of affinity is held to continue after the dissolution of the marriage if and so long as there is surviving issue of such marriage. This qualification is suggested also in some of the other cases, but, as it appears in the case before us there was no issue of the former marriage between decedent and plaintiff's mother, the question need not now be determined.

We reach the conclusion, therefore, that the relationship of affinity between the decedent and plaintiff which existed during the continuance of the marriage relation between decedent and plaintiff's mother terminated when the latter procured a divorce from decedent, and after that time plaintiff was not the daughter of decedent's wife, and the marriage between them was valid.

This conclusion renders it unnecessary to determine the sufficiency of the allegations of matters in estoppel found in plaintiff's reply which were held to be insufficient by the lower court on demurrer.

The judgment of the trial court is reversed.[12]

(D) Physical Disability

1. Impotency.—In England, the ecclesiastical courts had jurisdiction to annul a marriage on account of the impotency, or incapacity for sexual intercourse, of either of the parties. The marriage was not void, but voidable, and hence could not be collaterally attacked. A. v. B., L. R. 1 Prob. & Div. 559 (1868). The impotency of the husband did not render the issue illegitimate if the marriage was not annulled in the lifetime of the parties. Bury's Case, 5 Coke, 98b (1599). Inability to procreate or bear children is not impotency. Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 A. 697 (1920). See Larsen v. Larsen, 88 Pa. Super. Ct. 98 (1926), for an application of a peculiar statute. Venereal disease rendering copulation dangerous is physical incapacity, under a statute of Vermont. Ryder v. Ryder, 66 Vt. 158, 28 A. 1029, 44 Am. St. Rep. 833 (1892). Statutes in many American states specifically cover the question of impotency, as to whether it should be ground for annulment or divorce, and whether the effect of annulment should be retroactive or not. Local statutes should be consulted.

Impotency known to the other party at the time of marriage cannot be complained of, as when, from the age of the impotent party, it might have been expected. Hatch v. Hatch, 58 Misc. Rep. 54, 110 N. Y. S. 18 (1908). As to whether a marriage, voidable on this ground, may be ratified by long cohabitation, see M. v. D., L. R. 10 Prob. Div. 75, 175

[12] The present statutes in many of the states do not make affinity an impediment to marriage.

On the general subject of affinity as an impediment to marriage, see 2 Pollock and Maitland, History of English Law, pp. 385–387, also L. R. A. 1916C, pp. 730 and 756.

(1885), M. v. B., 33 L. J. Prob. (N. S.) 203, (1864), and Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 A. 697 (1920).

As to circumstances creating a presumption of impotency, see Tompkins v. Tompkins, 92 N. J. Eq. 113, 111 A. 599 (1920). As to the right to require a medical examination, see Le Barron v. Le Barron, 35 Vt. 365 (1862).

2. EPILEPSY.—In some states, persons having epilepsy, are forbidden to marry.

3. MISCEGENATION.—In a large number of states, marriages between whites and negroes, and in some, between whites and Indians, and whites and Mongolians, are forbidden. An excellent discussion of the whole question of miscegenation is in 36 Yale L. J. 858.

(E) PRIOR SUBSISTING MARRIAGE [13]

SCHAFFER v. KRESTOVNIKOW.

Court of Errors and Appeals of New Jersey, 1918. 89 N. J. Eq. 549, 105 A. 239.

Appeal from Court of Chancery.

Suit by Karl Schaffer against Maika (also known as Marie) Krestovnikow, otherwise Mary Schaffer, for annulment of marriage. From a decree of the Chancery Court (88 N. J. Eq. 523, 103 A. 913; 88 N. J. Eq. 192, 102 A. 246), dismissing the petition and awarding defendant support under the statute, pursuant to her counterclaim, petitioner appeals. Affirmed.

TRENCHARD, J. In 1889 the defendant, then Mary Rosenblitt, married Vasili Krestovnikow, a military bandmaster, in the town of Cherna-Ostraw, Russia. In 1902 she went through a marriage ceremony with the petitioner, Karl Schaffer, in Austria, having deserted her first husband at the solicitation of the petitioner. The petitioner and defendant then came to America and lived together in the city of Elizabeth, in this state, from 1902 until 1916, when the petitioner filed this petition for the annulment of his marriage to the defendant in 1902, alleging that it was void for the reason that her prior marriage to Krestovnikow in 1889 was still subsisting. The court below, after hearing,

[13] At common law, a prior subsisting marriage makes void another marriage of either of the parties, regardless of the good faith of the parties. Courts having jurisdiction to annul marriages will, however, entertain suits to have the marriage annulled. But see White v. Kessler, —— N. J. Eq. ——, 139 A. 241 (1927), and Mallon v. Mallon, 87 Pa. Super Ct. 42 (1925), where the clean hands doctrine was applied in annulment suits. See, also, 28 Col. Law Rev. 240.

Statutes in some states prohibit remarriage within a certain time after divorce. As to the status of marriages in violation of such statutes, see Heflinger v. Heflinger, 136 Va. 289, 118 S. E. 316, 32 A. L. R. 1088 (1923).

The scope of this topic is the effect, under various circumstances, of the subsequent removal of the impediment of the prior marriage.

dismissed the petition, awarded the defendant support under the statute pursuant to her counterclaim, and the petitioner appealed.

We are of the opinion that the decree below must be affirmed. At the outset we remark that there can be no reversal because of the action of the Vice Chancellor in permitting an amendment of the answer alleging illegality of the defendant's so-called first marriage. The allowance of such an amendment is within the sound discretion of the court, and will not lead to a reversal, unless a clear abuse of that discretion is shown. Here there is no such showing. Moreover, as we shall presently show, the rights of the petitioner could not possibly have been prejudiced by the amendment.

On the merits we think that the decree was right. In the view we take of the case, we do not find it necessary to consider whether the defendant's so-called first marriage was legal or illegal. If we assume that it was legal, as the petitioner contends, still his case fails in view of subsequent events.

It appeared that, after the petitioner enticed the defendant away from her first husband, they went through a marriage ceremony in 1902, and in that same year came to Elizabeth, in this state, where they cohabited, apparently matrimonially, for 14 years and upwards. We may assume that this cohabitation was illicit in its inception, and was known to both parties to be such. If so, of course, in the absence of proof to the contrary, the illicit relation will be presumed to have continued throughout the period of cohabitation; but this presumption is not conclusive. In other words, the presumption that a cohabitation known to both parties to be meretricious in its origin continues to be of that character may be rebutted, and proved to have become matrimonial, and a lawful common-law marriage established. Collins v. Voorhees, 47 N. J. Eq. 555, 22 A. 1054; Chamberlain v. Chamberlain, 68 N. J. Eq. 414, 59 A. 813. The change may be established by proof of circumstances excluding the presumption that the original relation continued and showing satisfactorily that it was changed to matrimonial union by mutual consent. Atlantic City R. Co. v. Goodin, 62 N. J. Law, 394, 42 A. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652; Mick v. Mart (Ch.) 65 A. 851; Bey v. Bey, 83 N. J. Eq. 239, 90 A. 684. In the present case there was such proof.

It appeared that Krestovnikow, the defendant's supposed husband, died in 1905. We agree with the Vice Chancellor that a presumption of his death is established by general neighborhood reputation that he died in the military service, testimony whereof was given by numerous and dependable witnesses. This testimony was admissible (Wharton, Ev. vol. 1, § 223; Wigmore, Ev. vol. 2, § 1605; Ringhouse v. Keever, 49 Ill. 470; Scott's Lessee v. Ratliffe, 5 Pet. 81, 8 L. Ed. 54; Arents v. Long Island R. R. Co., 156 N. Y. 1, 50 N. E. 422), and the presumption which thus arose was not overcome by any other evidence.

It also appeared that in 1905, when the petitioner and the defendant were informed of Krestovnikow's death (which death removed the

only impediment to marriage), the petitioner declared to the defendant that she was his wife, and thereafter the two, by habit, conduct, and declarations, held themselves out as husband and wife. We agree with the court below that these facts establish a lawful common-law marriage, and it follows that the petitioner was not entitled to the relief which he sought.

The decree below will be affirmed, with costs.

CHAMBERLAIN v. CHAMBERLAIN.

Court of Chancery of New Jersey, 1905. 68 N. J. Eq. 414, 59 Atl. 813.

Bill by Mary Chamberlain against Stroud H. Chamberlain. Heard on bill, answer, replication, and proofs. Decree advised for complainant.

STEVENSON, V. C. (orally). This bill is filed under the twentieth section of our divorce act by Mary Chamberlain against Stroud H. Chamberlain, who she alleges is her husband, charging that he has abandoned her and neglected and refused to support her, and praying for the statutory relief afforded in such a case. The answer contains an attempt, as I recall it, to answer the charges of misconduct set forth in the bill of complaint, but sets up as a complete defense —and this is the only defense which is supported by proof so as to call for consideration—that the defendant is not the husband of the complainant, and therefore is not liable to the statutory action, and is not liable to discharge the common-law duty which a husband owes to the wife in respect of support.

The brief for the defendant, which is very voluminous and discusses a large number of cases, presents at the start the following as the history of the case: "William Tissell and Mary Walsh (Mary Walsh being now the complainant, Mary Chamberlain) were married March 29, 1871. William Tissell left Mary Tissell and went to St. Louis, and thence to Oak Grove, Texas, March 12 or 15, 1877. About July, 1877, a letter was received by Mary Tissell from William Tissell. Mary Tissell, under the name of Mary Walsh, was married to Stroud H. Chamberlain April 4, 1880. Mary Chamberlain, under the name of Mary Tissell, filed a petition for divorce in this court, sworn to by her, May 8, 1880, and decree of divorce granted thereon June 30, 1881. From time of marriage to Stroud H. Chamberlain in 1880, both lived and cohabited together as man and wife until defendant left her, in March, 1903. There was no issue born of the marriage. Both complainant and defendant believed the first husband, William Tissell, was dead until after these proceedings (that is, the proceedings in this present suit) were instituted, when that he was alive was discovered by the defendant. William Tissell, the first husband, was, at the time of the filing of the bill and the hearing of this case, living at Oak Grove, Texas." * * *

We have, then, the case of a man and woman who undertook to enter into the marriage relation with each other on April 4, 1880, both parties believing in good faith that they were competent to enter into that relation—that each of them had the capacity to marry the other —while in fact one of the parties, the complainant, the woman, was under a disability on account of her having a husband then living. These two parties, entertaining such belief, were married by a clergyman in the city of Brooklyn, and thereupon began living together as man and wife, and continued to cohabit as man and wife, holding themselves out to the world as married, each recognizing the other as his or her lawful spouse, for a period of 23 years. The proofs, I think, indicate that, before the complainant undertook to marry the defendant, she went, with his knowledge, to counsel, and instructed him (the counsel) to institute a divorce suit against her former husband, William Tissell, whom she believed to be dead. Without waiting, however, to obtain the decree which was subsequently obtained, divorcing her from Tissell on the ground of desertion, she undertook to enter into the marriage relation with the defendant. Both parties appear to have had full knowledge of all the facts. * * *

After the decree of divorce had been obtained in June, 1881, the complainant and defendant were living together, and some question was raised among the women who were living in the same boarding house, or living near these parties, in regard to Mrs. Chamberlain's status. The complainant was then known, and had been known and always was known after her marriage in April, 1880, as Mrs. Chamberlain, and was regarded as the defendant's wife. * * *

I shall not deal in detail with this matter, because both of these parties most positively testified that they believed that their original marriage was absolutely valid, and that Tissell was then dead, and that they never believed otherwise until after this present suit was commenced.

When the decree of divorce was obtained in June, 1881, these two parties for the first time became capable of marrying each other. They thought, as they both swear, that they were capable of marriage at the time of the ceremony, April 4, 1880. That is proved to have been a mistaken belief, but when the decree of divorce was obtained in June, 1881, then they became for the first time capable of entering into the marriage relation with each other. They continued, after the complainant's disability had been removed, to live as man and wife until March, 1903, a period of nearly 22 years. During all that time they treated each other as husband and wife. The proof of continuous, unbroken matrimonial habit and repute is beyond doubt or question. * * *

The controverted question in this case is whether, under the circumstances that I have stated, the relation of husband and wife between these parties was created at any time after the disability of the com-

plainant to contract marriage with the defendant had been removed by the decree of divorce in June, 1881. In my opinion, upon the facts stated, the relation of husband and wife between these parties did begin—was created—at the time when the decree of divorce rendered it possible for them to marry. I am also of opinion that, if this first conclusion is erroneous, the relation of husband and wife began to exist a short time after the decree of divorce was obtained, when the defendant assured the complainant that it was not necessary to have any further ceremonial marriage between them; assured her that she was his legal wife; gave her this assurance in the presence of witnesses; and thereupon, in reliance upon such representations and statements of the defendant, the complainant remained with him, cohabiting with him as his wife, from year to year. * * *

There are three principal classes of cases which have come up in the courts where a man and woman have undertaken to establish before the world the status of marriage by a formal ceremony, and have continuously thereafter cohabited and held themselves out to the world as man and wife, when, in fact, at the time of the ceremonial marriage, one of them had a wife or husband already living, but where such incapacity during the course of the cohabitation has been removed by the death of the former wife or husband, or a decree of divorce has been obtained, dissolving such former marriage. One class of these cases is illustrated in Campbell v. Campbell, L. R. 1 H. L. Sc. 182, commonly referred to as the "Breadalbane Case." In that case a man eloped with a married woman, and lived in adultery with her. Subsequently the woman's husband died, and this man and woman continued to cohabit as they had formerly done; holding themselves out to the world, as they began to do at the time when they first lived together in adultery, as husband and wife. The House of Lords found that, under the circumstances of that case, the true rule would establish the marriage between these people who were treating each other as husband and wife at the time when they first became capable of entering into such relation. The doctrine of this case was rejected by our Court of Errors and Appeals in the case of Collins v. Voorhees, to which I shall next refer, and which belongs to the second class.

The case of Collins v. Voorhees, which I have before me, reported in the Court of Chancery under the name of Voorhees v. Voorhees' Executors, in 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404, and in the Court of Errors and Appeals in 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412, where the dissenting opinion of Mr. Justice Garrison appears, and on page 555, 47 N. J. Eq., page 1054, 22 Atl., where the opinion of the Court of Errors appears through Chief Justice Beasley, presented these facts: The man, Voorhees, obtained a fraudulent and void divorce in Connecticut from his wife, who resided in New Jersey. He knew that his suit and decree were a gross fraud on his wife, and on the court. He exhibited this

decree of divorce to a woman in Massachusetts, and she, honestly believing that he was lawfully divorced, was publicly married to him in a church, and thereafter continuously for some years cohabited with him as his wife, and was held out as his wife, and bore to him two children. As a matter of fact, a few months after this marriage Voorhees' wife in New Jersey heard of the fraudulent divorce which had been obtained in Connecticut, and appeared in the cause and had the decree opened, had permission to file a cross-bill, and the result was that the original decree obtained by Voorhees was vacated as fraudulent, and a decree of absolute divorce was granted to the New Jersey wife. This decree, of course, rendered Voorhees capable of marrying his Massachusetts wife. Voorhees, however, for manifest reasons, did not inform the woman who was living with him as his wife, in innocence, supposing that her marriage was lawful, that the decree of divorce had been set aside. He did not propose to have another marriage ceremony. He concealed fraudulently from the woman with whom he was living the fact that he had been incapable of marrying her when he undertook to do so, and that by the decree of divorce he had been rendered capable of such marriage. He went on for years enjoying all the fruits of his marriage or attempted marriage with this Massachusetts woman. In reliance upon his representations that he was her husband, and innocent of any wrongful intent, this woman surrendered herself to him and gave him all the advantages of marriage with her, and, of course, debarred herself from marriage with any other man.

The decision of the Court of Errors and Appeals, affirming the decree below in this case, was that the relations of Voorhees with the Massachusetts woman were not matrimonial at the start, because, of course, they could not be; but the decision goes further, and holds that the relations between Voorhees and this woman, when by the decree of divorce he had been rendered capable of marrying her, continued to be meretricious; that the matrimonial habit and repute after the divorce had been obtained must be referred back to the origin of the relations between these people. The court seem, in the opinion, to treat the case as belonging to the same class as the Breadalbane Case, where the relations between the parties—the man and woman—at the start were known to both to be meretricious.

It has always seemed strange to me that, in the opinions of the learned judges in this court and in the Court of Errors in this Voorhees Case, no reference is made to the law of estoppel—the great doctrine which is so potent in our law for the redress and the prevention of fraud. The case goes altogether upon the actual intent of Voorhees. In the Breadalbane Case the intent of both parties at the time the relations were established between them was to live in adultery, while they covered up their criminal relations by presenting the appearance of man and wife before the world. In the Voorhees Case the intention of this innocent woman was to enter into the lawful state of marriage with Voorhees. He committed a gross fraud on her in

obtaining possession of her and causing her to sacrifice her life to him, but she was not to blame. It has always seemed strange to me that no one suggested that Voorhees was estopped to deny that he consented concurrently with this woman to enter into the marriage state, when he had in the most solemn manner represented to her that he in fact did enter into that state with her, and, in reliance upon that representation, she had acted so much to her injury, and that, in accordance with the familiar rule, such estoppel became operative when he became capable of doing what he had falsely pretended to do.

I know of no reason why the doctrine of estoppel in pais should not be applied in dealing with the consent which is necessary—the concurrent consent of a man and woman capable of contracting that the marriage relation shall be established between them. A meeting of minds is necessary, generally speaking, in order to a valid contract, but oftentimes what courts enforce is not the thing which two parties have actually agreed upon; what they enforce is the obligation arising from the consent of one, and the estoppel against the other to deny a corresponding consent. Suppose a man takes a woman before a clergyman or a magistrate, and undertakes to go through a ceremonial marriage, and, instead of answering affirmatively the most important question in the ceremony, answers negatively by adding the word "not" just loud enough for two or three convenient witnesses to hear. To make the case plainer, suppose he adds between other responses statements to those witnesses to the effect that the whole proceeding is a sham. Suppose he then leads the woman to the church door, and abandons her there, and states that the whole proceeding has been a farce. We may concede that there is no marriage between them. We may concede that the case is similar to the one which has been dealt with in our courts quite frequently, where both parties have gone through an apparently valid marriage ceremony, but in jest, and without matrimonial intent. But suppose the man consummates this marriage—takes the woman to himself before the world as his wife. Can there be any question that he would be estopped to deny that he had consented? Suppose, to take another case, a man and woman enter into a written contract of marriage, and, by some obscure use of words, or by the use of ink which is not visible at the time the contract is signed, it is made to appear that the man had no intention whatever to enter into the marriage state with the woman. If she acts in good faith, and relies on his representation, and yields herself to him as his wife—gives up all her other opportunities of marriage—would he be allowed to prove his actual intent at a later time?

I do not think that I ought to hold that the Court of Errors and Appeals meant to exclude the operation of this great equitable doctrine of estoppel from all consideration in determining whether an effective concurrent consent has been given between a man and woman in order to establish the marriage state. It seems to me, if the case settles anything on this subject of estoppel, it establishes sub

silentio that the particular facts in that case did not make out an estoppel against Voorhees.

The third class of cases of the kind to which I have referred embraces those where the disability on the part of one party exists, but is unknown to either, and where both parties in good faith believe that no disability in fact exists, and therefore actually intend to enter into the marriage state. That is this case. In the opinion of Chief Justice Beasley in the Voorhees Case, it is distinctly admitted that in such a case as is now before this court a subsequent removal of the incapacity of one of the two parties marks the commencement of a valid marriage between them. He distinguishes such a case as this from the Breadalbane Case, and the distinction is perfectly plain. Referring to the opinion of Lord Westbury in the Breadalbane Case, the Chief Justice uses the following language (I read from page 558, 47 N. J. Eq., page 1055, 22 Atl.): "He [that is, Lord Westbury] does not pretend that he can find anything in its favor [that is, the doctrine which he lays down], and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry, and not to commit adultery; their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations, for, when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial subsequent to the removal of such impediment is the carrying into effect by the parties of their original purpose; but, when the original purpose was to live in adultery, the evidence under similar circumstances must be sufficient to show an abandonment of such purpose and the commencement of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest."

It seems to me that the distinction which Chief Justice Beasley so sharply draws between the Breadalbane Case and this Chamberlain Case now before this court is perfectly plain. The strange thing to me, which, perhaps, may be due to my inability to analyze these cases correctly, is that the great Chief Justice should have supposed that the Breadalbane Case, and the Voorhees Case are in the same class. In the Breadalbane Case the original purpose of both parties was to live in adultery, covering up their adulterous connection by the false appearance of marriage. In the Voorhees Case the unfortunate woman had no criminal intent, but from the start intended to live in marriage relations with the man who pretended that he could marry her. As I said before, no one suggested that this man Voorhees might or ought to have been held estopped to deny his matrimonial intent at the first moment when the matrimonial intent on his part became possible. In my opinion, there is almost as wide a distinction between the

Voorhees Case and the Breadalbane Case as there is between the Breadalbane Case and this Chamberlain Case.

I think that Chief Justice Beasley, speaking for the Court of Errors and Appeals, plainly admits that in a case like this, where the parties come together and in the most solemn manner accept each other as husband and wife, and concurrently intend to establish that relation, and manifest that concurrent intention in the usual solemn form before a clergyman or a magistrate, they do not intend to live in adultery, and if, in fact, by reason of an unknown impediment (an unknown incapacity on the part of one of them to contract the marriage which they have attempted to contract), they have begun in fact to live in adultery, then, upon a subsequent removal of the impediment, if they continue to cohabit as man and wife (continue to live in precisely the same way in which they began to live together), such subsequent continued cohabitation must be deemed matrimonial, in accordance with the original intent, and cannot be deemed illicit, in accordance with an intent which neither of them ever had.

The three classes of cases which I have described seem to me to be essentially distinct from each other. In the first class, of which the Breadalbane Case is the type, both parties know of the impediment. Both intend not to marry, but to live in adultery. Both intentionally make a false pretense of marriage before the world in order to conceal their meretricious relation.

In the third class, to which this case and the case of De Thoren v. Attorney General, L. R. 1 App. Cas. 686, cited by Mr. Justice Garrison in his dissenting opinion, belong, both parties are ignorant of the impediment; both intend in good faith to marry, and do not intend to commit adultery; both believe that they are in fact lawfully married; and both make an honest representation to the world to that effect.

In the second class, which is intermediate between the others, and to which the Voorhees Case belongs, one of the two parties is in the situation of both parties in the Breadalbane Case, and the other party is in the situation of both parties in this Chamberlain Case and the De Thoren Case.

In determining the effect on the status of the parties in each of these classes of cases which is produced by the removal of the impediment while the cohabitation apparently matrimonial continues, it seems to me that a rule laid down in one of the classes of cases may be plainly inapplicable to either of the others. The three situations seem to be widely variant, and to call for the application of radically different principles of morals and public policy. * * *

If I am right in the view which I have expressed in regard to the application of the great doctrine of estoppel in cases like this and in cases like the Voorhees Case, in establishing a lawful marriage, by preventing one of the parties from denying that he or she concurrently with the other consented to the establishment of the status of mar-

riage between them, as I think I intimated earlier, there is another ground upon which the marriage between these parties may be rested. If the marriage should be established for this reason, then, as I said, it would date, not from the removal of the disability, but from the time when the defendant made the representations to the complainant that he was her husband and she was his wife, and that no further marriage ceremony was necessary between them, and the complainant acted on those representations. Even if we might suppose that these declarations are not evincive, beyond doubt, of the matrimonial intent on the part of the defendant—if there is any theory of the case upon which it might be held that the intent of the defendant in living with this woman in the apparent relation of marriage after the divorce had been obtained was not bona fide, and that his intent in maintaining those relations must be referred back to the actual state of things when the marriage ceremony was performed—I strongly incline to think that the defendant should be held estopped to deny the existence of the matrimonial intent which he manifested so distinctly when he persuaded this woman that no further marriage was necessary, and induced her to continue living with him as his wife. She acted upon the intent which he manifested to her, and it seems to me that sound law, sound morals, require that the defendant, whatever his actual intent might have been, must be held estopped to deny the intent which he exhibited and manifested beyond doubt by representations upon which the complainant acted for years.

This case can plainly be distinguished from the Voorhees Case on account of the positive representations and assurances which the defendant made directly to the complainant after her divorce had been obtained, and upon which she acted in continuing to cohabit with him as his wife. I am bound, whatever my private opinion may be, to apply the law of the Voorhees Case while that case stands not overruled nor even modified, but I am not bound to extend the law of that case to other cases presenting a substantially different state of facts. * * *

I have perhaps said too much about the doctrine of estoppel in its application to this case, because, apart from that doctrine, I think the decision of this present case may be rested firmly upon the proposition that the proofs show beyond the shadow of a doubt that from the date of the divorce in this case, which removed this woman's incapacity to marry, the man and woman lived together as husband and wife, believing that they were husband and wife, consenting that the status of marriage should exist between them, and believing that such marriage status did exist. This, in my judgment, makes a marriage, and it is immaterial whether there was a particular date when some ceremony was pronounced between them, or some form of words was employed. It is enough if they concurrently intend that the marriage status shall exist between them, and each knows that the other so intends. All the rest is a mere matter of proof. * * *

My conclusion is that the complainant is entitled to a decree which will make the defendant liable, under the statute, to provide for her support and maintenance. The abandonment and neglect and refusal to support are proved in this case beyond doubt, and the decision which I have rendered disposes of the only defense which is worthy of consideration. * * *[14]

[14] If the cohabitation was matrimonial in its inception, on the part of both parties, the courts have generally held that its continuance after the removal of the impediment is sufficient, without further proof of a new express exchange of consent, to warrant a finding of marriage after the removal of the impediment. Poole v. People, 24 Colo. 510, 52 P. 1025, 65 Am. St. Rep. 245 (1898); Manning v. Spurck, 199 Ill. 447, 65 N. E. 342 (1902); Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. Rep. 171 (1903); Schuchart v. Schuchart, 61 Kan. 597, 60 P. 311, 50 L. R. A. 180, 78 Am. St. Rep. 342 (1900); Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199 (1902); Taylor v. Taylor, 63 App. Div. 231, 71 N. Y. S. 411 (1901). Compare People v. Shaw, 259 Ill. 544, 102 N. E. 1031, L. R. A. 1915E, 87 (1913), where the court held that, since the second marriage was ceremonial, and was believed to be valid, no common-law marriage was intended.

The rule stated in the last paragraph has also been applied, where there was a known impediment at the beginning of cohabitation, but a proved desire to marry as soon as the impediment was removed. University of Michigan v. McGuckin, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917 (1901) Id., 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917 (1902). See, also, State v. Worthington, 23 Minn. 528 (1877).

Where only one of the parties knew of the impediment, and the other was innocent, the court held, in Re Schmidt, 42 Misc. Rep. 463, 87 N. Y. S. 428 (1904), that the removal of the impediment, and the continued cohabitation, made a valid common-law marriage. See, also, Flanagan v. Flanagan, 122 Mich. 386, 81 N. W. 258 (1899), where there was some evidence of a new agreement. Contra: Hunt's Appeal, 86 Pa. 294 (1878), and Collins v. Voorhees (Voorhees v. Voorhees' Ex'rs, 46 N. J. Eq. 411, 19 A. 172, 19 Am. St. Rep. 404 [1890]), cited in the principal case. Cf. Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33, 124 Am. St. Rep. 555 (1907).

If the cohabitation was originally meretricious on the part of both parties, there is no occasion to presume that it later became matrimonial, unless it appears that the parties learned of the removal of the impediment. Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105 (1887); Blodgett v. Blodgett, 109 Wash. 597, 187 P. 340 (1920). See, also, Randlett v. Rice, 141 Mass. 385, 6 N. E. 238 (1886).

Where the parties to an originally meretricious cohabitation learn of the removal of the impediment, and continue to cohabit apparently matrimonially, the doctrine of the Breadalbane Case (Campbell v. Campbell, L. R. 1 H. L. Sc. 182 [1867]), cited in the principal case, was followed in the following cases: Adger v. Ackerman, 115 F. 124, 52 C. C. A. 568 (1902); Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631 (1901); Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935 (1907). But in Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190 (1908), Pike v. Pike, 112 Ill. App. 243 (1904), and Henry v. Taylor, 16 S. D. 424, 93 N. W. 641 (1903), it was held that a relation originally meretricious is presumed to continue so, and the presumption will not be overcome by mere matrimonial habit and repute.

MAD.D.R.

In re MEEHAN'S ESTATE.

Supreme Court, Appellate Division, First Department, 1912. 150 App. Div. 681, 135 N. Y. S. 723.

Appeal from Surrogate's Court, New York County.

Application for letters of administration de bonis non on the estate of Frank C. Meehan, deceased. Appeal from a decree granting the letters. Decree affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

MILLER, J. A marriage ceremony between Frank C. Meehan, the intestate, and Caroline F. McDonald, was solemnized according to the rites of the Roman Catholic Church on January 30, 1881, and the said parties thereto lived and cohabited together, and were recognized by their friends and acquaintances as husband and wife from that time until the death of the latter on August 21, 1902. Her estate was administered by the survivor, who died on March 24, 1906. Two children, a son and a daughter, were born of that marriage. This is a contest between the respondents, said children, and the appellants, a brother and sister of the deceased, for the right to administer his estate. The appellants assert that said marriage was invalid because Meehan had a wife living at the time it was contracted. A ceremonial marriage between him and Sarah Ruppius was solemnized, also according to the rites of the Roman Catholic Church, on September 16, 1877. They lived together but a short time. There is evidence, however, tending to prove that said Ruppius was alive after the second marriage and was seen in his company even after the death of the respondents' mother. But there is nothing to show that she ever made a claim upon him, or that they ever maintained matrimonial relations after the first separation. She has never appeared to claim a share of his estate. There is testimony which suggests that Meehan obtained a divorce from her, and the surrogate found that their marriage was legally dissolved prior to January 30, 1881.

There are certain presumptions to which both sides agree; **i. e.**, the presumption of innocence, the presumption of the legality of a marriage, which is strengthened if it be a ceremonial marriage, and the very strong presumption which the law always indulges in favor of the legitimacy of children. But the appellants invoke the well-known rule that a state of facts once proved to exist is presumed to continue, and, in particular reliance upon Matter of Hamilton, 76 Hun, 200, 27 N. Y. S. 813, assert that they have proven that Meehan had a wife living when he contracted the second marriage, and, at any rate, that the case presents conflicting presumptions of equal strength which neutralize each other, leaving the burden upon the one having the affirmative to prove it.

In the case relied upon, the appellant, claiming to be the widow of the testator Hamilton, undertook to contest his will; but it was shown that prior to her marriage to him she had contracted a marriage with one Mann, and the court held that the burden was upon her to prove that the former marriage had been dissolved. In this case it does not appear that any living person, whose whereabouts are known, has knowledge of the fact to be proved—a sufficient reason, if there were no other, to distinguish the Hamilton Case. There is evidence in the record which suggests a possible situation in which the Hamilton Case would apply. It appears by the certificate, put in evidence by the appellants to prove the first marriage, that the said Ruppius had already been married, as her maiden name was given as Taylor. If then she had appeared and claimed the right to letters of administration, she would have had to prove, under the doctrine of the Hamilton Case, that her marriage to Ruppius had been dissolved.

While there appears to be no case in this state directly in point, there are numerous decisions in other jurisdictions to the effect that, if necessary to support the legality of the second marriage, it will be presumed, in the absence of evidence to the contrary, that the first marriage had been legally dissolved. See Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; Pittinger v. Pittinger, 28 Colo. 308, 64 P. 195, 89 Am. St. Rep. 193; Erwin v. English, 61 Conn. 502, 23 A. 753; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322; Boulden v. McIntyre, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; Leach v. Hall, 95 Iowa, 611, 64 N. W. 790; Howton v. Gilpin (Ky.) 69 S. W. 766; Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680; Maier v. Brock, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; Thewlis' Estate, 217 Pa. 307, 66 A. 519; Carroll v. Carroll, 20 Tex. 732; Thomas v. Thomas, 53 Wash. 297, 101 P. 865. We prefer, however, to rest our decision on a somewhat broader ground.

The law indulges in presumptions from the necessities of the case in the absence of sufficient evidence to establish the fact to be proved. While the known facts may be insufficient of themselves to justify a particular inference, they may tend to weaken or strengthen a particular presumption. There can consequently be no ironclad rule, and as the surrounding circumstances of different cases are rarely the same, precedents in this class of cases can rarely be controlling. In this case the presumption of the validity of the second marriage is greatly strengthened by the uninterrupted cohabitation of the parties to it for more than 20 years and until the death of one of them, the attitude of their friends, relatives, and acquaintances, the birth of children, and the conduct of the alleged former wife. It is not correct therefore to say that the presumption of the continuance of the first marriage, assuming it to have been valid, is as strong as the presumption of the validity of the second marriage.

We think that, where the fact of a marriage, especially of a ceremonial marriage, followed by the long cohabitation of the parties and the birth of children, is established, it is incumbent upon whoever assails the validity of the marriage and the legitimacy of the children to prove his case, by evidence instead of presumptions, even if that involve proof of a negative, and especially when, as here, the attempt is made after the lapse of 30 years and the death of the parties, not by any one claiming rights under an alleged prior marriage, but by relatives who would deprive children of their inheritance by branding them as illegitimates. The appellants have failed to bear the burden of proof imposed upon them. The first marriage may have been legally dissolved, or, what is quite as probable, it may have been invalid because the said Sarah Ruppius had a husband living at the time.

The decree should be affirmed, with costs and disbursements. All concur.[15]

(F) MARRIAGE IN JEST

McCLURG v. TERRY.

Court of Chancery of New Jersey, 1870. 21 N. J. Eq. 225.

The CHANCELLOR. The complainant seeks to have the ceremony of marriage performed between herself and the defendant, in November, 1869, declared to be a nullity. The ground on which she asks this decree is that, although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot, he in the same spirit accepted the challenge, and the justice at their request, performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such

15 See a note on "The conflict of presumptions on successive marriages by the same person." 30 Harv. L. Rev. 500. See, also, 34 A. L. R. 441.

excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and, if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty. * * *

I am satisfied that this court has the power, and that this is a proper case to declare this marriage a nullity.[16]

(G) Fraud

REYNOLDS v. REYNOLDS.

Supreme Judicial Court of Massachusetts, 1862. 3 Allen [85 Mass.] 605.

Libel for a sentence of nullity of marriage, setting forth that the libelant was married to the respondent on the 11th of October, 1856; that he was then only seventeen years of age, and the respondent was thirty years, or over; that he had been acquainted with her for only six weeks; that he was induced to marry her by means of false and fraudulent representations that she was a chaste and virtuous woman, which he believed to be true; and that her friends with whom she then lived represented to him, at her procurement, that she was honest and virtuous; but in truth she was not virtuous, but was at the time of the marriage pregnant with child by some person to the libelant unknown,

[16] Accord: Dorgeloh v. Murtha, 92 Misc. Rep. 279, 156 N. Y. S. 181 (1915); Crouch v. Wortenberg, 86 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212 (1920); Id., 91 W. Va. 91, 112 S. E. 234 (1922); Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520 (1924). But see Barker v. Barker, 88 Misc. Rep. 300, 151 N. Y. S. 811 (1914), a case between different parties, but involving the same marriage as Dorgeloh v. Murtha, supra.

Cf. Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155 (1901).

It was held in Lee v. State, 44 Tex. Cr. R. 354, 72 S. W. 1005, 61 L. R. A. 904 (1902), that, where one of the parties intends matrimony and the other does not, the one who does not cannot assert the validity of the marriage. See, also, Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4, 25 Ky. Law Rep. 463 (1903).

of which child she was delivered on or about the 7th of March, 1857, and the libelant did not thereafter live or have any intercourse with her.

The respondent filed a demurrer, and the case was reserved by Dewey, J., for the determination of the whole court.

BIGELOW, C. J. The libel in the present case is the first one which has been brought under that provision of the statute enacted by St. 1855, c. 27, and re-enacted by Gen. Sts. c. 107, § 4, which authorizes this court to grant a divorce where a marriage is supposed to be void, or the validity thereof is doubted, on the ground of fraud. It is quite obvious, from the terms in which the statute is expressed, that it was founded on the assumption that a marriage, into which one of the parties was induced to enter through the fraud and deception of the other, is null and void, and, like other contracts, may be annulled and set aside by the defrauded party. The statute does not provide that fraud shall vitiate a contract of marriage, but only confers an authority on the court to decree a dissolution of the marriage for such cause, as in other cases of nullity. Nor does it define or in any way prescribe the nature of the fraud, or the degree or amount of deception which shall be deemed to be sufficient to warrant the court in adjudging the contract to be void. This is left to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage. Indeed, it would be difficult if not impossible to lay down any general rule or definition which would comprehend all cases coming within the range of the legal import of the word "fraud." A learned writer terms fraud hydra multorum capitum. An inquiry into the fraudulent intent and conduct of parties necessarily involves an investigation of facts; and, as no two cases are precisely alike in their circumstances, it follows that the question whether fraud exists sufficient to vitiate a contract always depends very much on the nature of the transactions, the means of information possessed by the parties, and their relative situation and condition towards each other. The only general rule which can be safely stated is, that to render a contract void on the ground of fraud there must be a fraudulent misrepresentation or concealment of some material fact. What amounts to such misrepresentation or concealment, and whether the fact misstated or withheld is material, are questions to be decided according to the circumstances developed in each case, as it arises for judicial determination.

While, however, marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or mis-

apprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relations rest. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring. It would tend to defeat this object, if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie. The law therefore wisely requires that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of "a blind credulity, however it may have been produced." Ewing v. Wheatley, 2 Hagg. Con. 175–183. Wakefield v. Mackay, 1 Phillimore, 134, 137, n. 1 Fraser's Dom. Rel. 230. Bish. Mar. and Div. §§ 100, 101. Nor is it unreasonable that each one should take on himself the burden of inquiring into representations concerning the character and qualities of the person whom he intends to marry, which, by the exercise of due caution and discretion, can be ascertained to be true or false, instead of lying by and using them to defeat a contract after it has become executed, and a portion of its fruits has been enjoyed. The only doubt which has arisen as to the wisdom or expediency of this doctrine has been occasioned by cases of antenuptial incontinence and want of chastity in females. It has been maintained by some writers, especially by commentators on the civil law, that chastity in woman is a quality which lies at the foundation of the contract of marriage, and constitutes one of its essential elements, and that any misrepresentation or concealment, by which a man has been led to believe that a woman whom he has married was chaste and virtuous, who, prior to the marriage, had been in fact defiled and debauched, was good ground for impeaching and vacating the marriage. Voet, 24, 2, 15; 1 Fraser's Dom. Rel. 231, and authorities there cited. But the better opinion seems to be that chastity stands on the same ground as other personal qualities; that there is nothing in the contract of marriage which implies that a woman shall have previously been pure and undefiled, or which renders unchastity prior to the execution of the contract an impediment to a valid marriage. It is doubtless true that in many cases the knowledge of such defect would prevent the consummation of the contract, and under certain circumstances might justify a man, while it was executory, in refusing to perform it. But a different

rule applies when the contract has been executed. Nothing can then avoid it which does not amount to a fraud in the essentialia of the marriage relation. And as mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy, does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. In regard to continence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences if a woman who had once fallen from virtue could not be permitted to represent herself as continent, and thus restore herself to the rights and privileges of her sex, and enter into matrimony without incurring the risk of being put away by her husband on discovery of her previous immorality. Such a doctrine is inconsistent with reason and a wise and sound policy. Bish. Mar. and Div. § 105; Scroggins v. Scroggins, 14 N. C. 535, 544; 1 Fraser's Dom. Rel. 231; Graves v. Graves, 3 Curteis, 235; Best v. Best, 1 Addams, 411.

But a very different question arises where, as in the case at bar, a marriage is contracted and consummated on the faith of a representation that the woman is chaste and virtuous, and it is afterwards ascertained, not only that this statement was false, but that she was at the time of making it and when she entered into the marriage relation pregnant with child by a man other than her husband. The material distinction between such case and a misrepresentation as to the previous chastity of a woman is obvious and palpable. The latter relates only to her conduct and character prior to the contract, while the former touches directly her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of representations that she is chaste and virtuous. In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation. As has been already stated, one of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage.

Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable to perform an important part of the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact material to this contract, and on well-settled principles affords good ground for setting it aside and declaring the marriage void.

This conclusion is strengthened by a consideration of the consequences which might result from a different doctrine. The rule of the common law is that, if a man marry a woman who is with child, it raises a presumption that the child with which she is pregnant was begotten by him. This presumption is founded on the supposed acknowledgment of paternity by the subsequent act of marriage, and, although such presumption is liable to be rebutted, yet in the absence of proof it stands. Hemmenway v. Towner, 1 Allen, 209; Phillips v. Allen, 2 Allen, 453. A man therefore who has contracted a marriage with a woman under such circumstances, if he could not obtain a divorce on the ground of fraud, would be subjected to the painful alternative of disowning the child, and thereby publishing to the world the shame of her who was still to remain his wife, or suffer the presumption of legitimacy to stand, and admit the child of another to share in his bounty and receive support in like manner as his own legitimate children. There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations and attended with such results upon an innocent party should be held valid and binding on him. An enforced union under such circumstances would not tend to promote or give dignity or sanctity to the institution of marriage. On the contrary, it would tend to bring it into contempt, by compelling parties to continue in the relation of husband and wife after the basis of confidence and harmony has been taken away by the destruction of mutual respect and affection.

It is not to be overlooked, in the consideration of the question whether antenuptial pregnancy should constitute a sufficient ground of divorce, where it is unknown and kept concealed from the husband, and the marriage is contracted on the faith that the woman is chaste and virtuous, that the existence of the fact cannot be ascertained before marriage by any of the ordinary means of personal intercourse, or by careful and diligent inquiry. Nor would it be known after marriage in the earlier stages of gestation, nor even at a later period, where, as in the case at bar, the husband was immature and inexperienced. Such a case does not come within the principle which requires persons to act with caution, and after due inquiry concerning the personal qualities and character of those with whom they intend to contract marriage.

We do not mean to be understood as saying that pregnancy in a woman before marriage is a valid ground of divorce, where the husband, after having good reason to know the fact, continues his cohabitation and takes no immediate steps to repudiate his wife. Nor do we ex-

press any opinion concerning another class of cases which have arisen, where the pregnancy of the woman has been known to the husband and he has been induced to enter into the contract of marriage by false representations that he was the father of the unborn child. We confine our judgment to the precise case stated in the libel. Assuming the facts therein stated to be true, and that, on discovery of the fraud, the husband left the wife and took immediate steps to annul the marriage, we think he shows a sufficient ground to ask for a sentence of nullity of marriage. See Morris v. Morris, Wright (Ohio) 630; Ritter v. Ritter, 5 Blackf. (Ind.) 81; Scott v. Shufeldt, 5 Paige (N. Y.) 43; Baker v. Baker, 13 Cal. 87.

Demurrer overruled.[17]

GARD v. GARD.

Supreme Court of Michigan, 1918. 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923.

Appeal from Circuit Court, Berrien County; George W. Bridgman, Judge.

Suit by John Jay Gard against Margaret G. Gard. From decree for plaintiff, defendant appeals. Affirmed.

Argued before OSTRANDER, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ.

FELLOWS, J. Plaintiff, a young farmer about 29 years old, lives in Berrien county. Defendant, a woman 31 years old, resided in Chicago prior to her marriage to plaintiff. Plaintiff files this bill to annul the marriage between the parties on the ground of fraud in its procurement. Defendant denies the fraud, and, claiming the benefit of a cross-bill, asks for a decree of divorce. The prayer of plaintiff's bill was granted, and defendant appeals.

Without detailing the testimony, it will suffice to state that, from a careful perusal of this record, we are convinced that the following facts are established beyond peradventure: (1) That the parties were married February 17, 1916; (2) that they had sustained illicit relations prior to marriage; (3) that the day before the marriage defendant came from Chicago to St. Joseph, in this state, there met plaintiff by appointment, and there falsely represented that she was pregnant by plaintiff, which representation was believed by plaintiff, who married her to so far as possible repair his wrong; (4) that defendant was delivered of a full-term child March 6, 1916; (5) that said child was not begotten by plaintiff, but was the child of another man, who was in the Philippines at the time defendant charged plaintiff with its paternity, and that defendant well knew this to be true; (6) that upon learning that the child was a full-term child, and could not be his, plaintiff repudiated

[17] See note 18, p. 609, infra.

defendant and the spurious offspring, and has not since lived or cohabited with her.

We therefore have before us for solution the question of whether a bill will lie to annul a marriage procured by the false representation of the wife before marriage that she is pregnant by the man she marries, which misrepresentation is known by her to be untrue, but is believed by the husband, and the marriage relation is contracted in such belief, the parties theretofore having sustained illicit relations, when it is established beyond question, as matter of fact, that the child was begotten by a stranger. In Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770, this court, by an equal division, sustained such a bill. Sylvester v. Sylvester, 180 Mich. 512, 147 N. W. 454, was also affirmed by an equally divided court; the court was not in accord upon the facts in that case. The precise problem before us must therefore be regarded as one not heretofore solved by this court. It has arisen in other jurisdictions, and a want of harmony in these decisions, directly and by analogy applicable, is at once apparent to one who examines the cases.

In the early case of Reynolds v. Reynolds, 3 Allen (Mass.) 605, a case similar in principle to Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364, the libelant was induced to enter the marriage upon the representations that the woman was a chaste and virtuous woman, when as matter of fact she was pregnant of another. He had had no illicit relations with her. The court upon that state of facts, speaking through Chief Justice Bigelow, said: [The learned court here quoted a part of the opinion appearing on pages 601–602 supra.]

The court, however, did not have before it the precise question here involved, viz. what rule should be applied, if the relations of the parties had been illicit prior to the marriage, and expressly reserved that question. In Foss v. Foss, 12 Allen (Mass.) 26, however, that question arose. This case is quite frequently cited as authority for denying relief, and is a leading case upon the subject. An examination of this case leads to the conclusion that the court was impressed that under the circumstances the libelant was not as vigilant as he should have been in ascertaining before marriage whether her representations were true. It is said:

"He took no steps to ascertain the truth of her statements concerning the paternity of the child, but, relying solely on her assurances on that subject, he entered into the contract of marriage. It seems to us that on these facts he was guilty of a blind credulity, from the consequences of which the law will not relieve him. His knowledge of the respondent's unchastity, and of her actual pregnancy, was sufficient to put a reasonable man on his inquiry."

It was followed in Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98, the opinion in which case in full is as follows:

"The facts show that the libelant had full knowledge that the libelee was unchaste before he entered into the marriage contract, and was thereby put on his guard so that he cannot allege that he was induced

to contract the marriage by such fraud and deceit on the part of the libelee as will enable him to avoid the contract"—and Foss v. Foss is cited as authority for the holding.

In the late case of Safford v. Safford, 224 Mass. 392, 113 N. E. 181, L. R. A. 1916F, 526, the same question again arose, and again, upon the authority of Foss v. Foss, the relief was denied, the court, among other things, saying:

"In view of the undisputed facts as disclosed by the record, it seems plain that he is not entitled to a decree declaring the marriage void in the absence of evidence to show that he made any inquiry or investigation to ascertain the truth of her statement that he was the father of the child."

These holdings of the Massachusetts court are not as persuasive to us as the holdings of that court usually are, due to the fact that this court has repeatedly held, in cases involving fraud, that it does not lie with one charged with fraud, who assumes to have knowledge of a subject of which another may well be ignorant, to claim that such other should have used greater diligence to discover the fraud, should have been more vigilant, less credulous. Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377; Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Yanelli v. Littlejohn, 172 Mich. 91, 137 N. W. 723; Lewis v. Jacobs, 153 Mich. 664, 117 N. W. 325; Smith v. Werkheiser, 152 Mich. 177, 115 N. W. 964, 15 L. R. A. (N. S.) 1092, 125 Am. St. Rep. 406; John Schweyer v. Mellon, 196 Mich. 590, 162 N. W. 1006; Johnson v. Campbell, 165 N. W. 823.

In Garris v. Garris, 24 N. J. Eq. 516, the New Jersey court had before it a case upon the facts similar to Reynolds v. Reynolds, supra, and it was disposed of in the same manner, the court saying:

"The fraud charged in this case is extraordinary, peculiar, and of the most flagrant character, entering into the very essence of the contract, and, if allowed to succeed, either compelling the husband to disown the child for his own protection, or imposing upon him the necessity of recognizing and maintaining the fruit of his wife's defilement by another, and having it partake of his inheritance. In either event, shame and entire alienation are the inevitable consequences. Surely, there can be no good policy in such action as will either compel parties to live together under these circumstances, having only the shadow of marriage, or compel them, as would be more likely, to live totally separated, a continual annoyance to each other, and a source of the greatest unhappiness. If the contract is repudiated as soon as the fraud is discovered, so that there is no acquiescence in it, good morals and the protection of the integrity of the marriage relation require that an innocent man should be relieved from so great a fraud."

In Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 A. 376, and Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 A. 426, that court had before it the question here involved. In both cases the parties had sustained illicit relations before marriage, and in both cases the woman had repre-

sented that she was pregnant by the man induced to marry her when in fact she was pregnant by another. In both cases the relief was denied. Both cases seem to go upon the theory that the parties were in pari delicto and must abide the consequences.

The forceful language of Mr. Justice Field, then a member of the Supreme Court of California, and later Justice of the Supreme Court of the United States, in the case of Baker v. Baker, 13 Cal. 87, may well be considered. He said:

"A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than a union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name, and the heir of his estate, and that, too, with the silent, if not expressed, contempt of the community."

Later, however, the Supreme Court of California in Franke v. Franke had before it a case where illicit relations had been indulged in prior to the marriage. The wife was pregnant of another at the time of the marriage. The opinion is not reported in the official reports of the court (see 96 Cal. xvii), but is found in 31 P. 571, and 18 L. R. A. 375. An examination of the opinion discloses that the husband was a man of 40 years, father of five children by a former wife, who claimed he was seduced by a 17 year old girl, daughter of a neighbor, and who married the girl to avoid a lawsuit, and rather than "give money away," and with the further assurance from the attorney of the girl that, if the birth of the child did not correspond with "plaintiff's reckoning," he would get him free "without a cent." Under these facts the relief was denied. [North Carolina Cases were here discussed.]

In Scott v. Shufeldt, 5 Paige (N. Y.) 43, the marriage was procured on the representation that the child was the child of the husband. Both the husband and wife were white. The child was a mulatto and could not have been begotten by the husband. It was held that, if the husband married in the belief that the child was his, the marriage should be annulled on the grounds of fraud.

Three courts of last resort have recently spoken on this subject with definiteness and precision, upon facts substantially on all fours with the instant case. Lyman v. Lyman, 90 Conn. 399, 97 A. 312, L. R. A.

1916E, 643; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609; Wallace v. Wallace, 137 Iowa, 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761. In two of these cases the opinion by Mr. Justice Morse concurred in by Mr. Justice Campbell in Sissung v. Sissung, supra, is expressly approved. [Quotations from the three cases cited are omitted.]

We have considered the decisions of the various states to which our attention has been challenged in the briefs, together with such as our time for independent research would permit, where the question has been presented with any degree of frequency or considered at length. Many other cases, bearing either directly or indirectly on the subject, have also been examined, among them being Morris v. Morris, Wright (Ohio) 630; Hoffman v. Hoffman, 30 Pa. 417; Todd v. Todd, 149 Pa. 60, 24 A. 128, 17 L. R. A. 320; Allen's Appeal, 99 Pa. 196, 44 Am. Rep. 101; Ritter v. Ritter, 5 Blackf. (Ind.) 81; Steele v. Steele, 96 Ky. 382, 29 S. W. 17.

We are persuaded that we should adopt the doctrine advanced by Justices Morse and Campbell in Sissung v. Sissung, supra, and the three recent cases heretofore adverted to. That this plaintiff has been defrauded, deceived, and tricked into this marriage we entertain no doubt. It is intolerable to believe that he should be compelled to continue through life as the husband of defendant, caring for, as his own, this bastard child of another, with its constant reminder of his wife's perfidy before marriage, because in attempting to right a supposed wrong he entered into the contract of marriage. That a man may have a true parental affection for the child that sprang from his own loins, even though conceived before marriage, is natural; but that he should have such affection for one that sprang from the loins of another man, and was foisted upon him by a designing woman, is unbelievable. It has been said in many of the cases cited that one of the great purposes of marriage is procreation. It is evident that a wife pregnant by another cannot carry out that purpose, and hence that purpose of marriage must fail. All true; but there are other purposes of marriage beyond the perpetration of the species. One of the purposes is the maintenance of the sacred institution called home. It has been said that there are three parties to the contract of marriage, the two contracting parties and the public. Can it be that a wise public policy requires in the name of home the maintenance by the husband of an establishment presided over by one who has deceived him as to the paternity of the little one who daily sits at his board, who bears his name, and who will, in the absence of testamentary disposition, inherit his property, the offspring of another, a stranger to his blood? Most assuredly not. We do not palliate plaintiff's infraction of the moral code. Society will visit its penalties upon him. We are not the keepers of his conscience or the censors of his morals. We can only administer the law, imposing penalties only that are imposed by the law, granting relief only as the law

affords relief. Under the law this plaintiff is entitled to be relieved from this contract of marriage, procured by fraud, and a fraud well calculated to deceive under all the facts in the case, and which did deceive the plaintiff, and caused him to do the only thing an honorable man could do after his transgression of the moral code, with its supposed result.

We do not overlook the claim most earnestly pressed by defendant's counsel at the argument and in the brief that during the acquaintance of the parties defendant informed plaintiff that she had had intercourse with another. It is urged that this should have prompted more vigilance on the part of plaintiff. We have already called attention to the holdings of this court upon this subject, and certain facts to which we shall presently refer will demonstrate that the circumstances would readily prompt a reasonably prudent man to believe defendant's claim as to the paternity of the child. If plaintiff was seeking annulment of the marriage on the sole grounds of want of chastity of his wife, he could not successfully assert he had been defrauded if he had knowledge on the subject before the marriage. Nor, under the authorities, could he assert her want of chastity as grounds for annulment, where he himself had been a party to her unchaste conduct. The gist of the action here, the right to relief, is based upon the ground that she has falsely represented herself to be pregnant by plaintiff, when as matter of fact she was pregnant by another. As was said by the Supreme Court of Texas in McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593, 5 Am. St. Rep. 96:

"It is settled law that the husband cannot have the marriage annulled because the wife was with child by him at the date of the marriage. If a condition of pregnancy at that time is, under any circumstances, an impediment to marriage, it must be because it will impose upon the husband a spurious offspring."

The plaintiff might have been willing to protect the woman with whom he had been intimate, and who he supposed was pregnant by him, even though she had been unchaste before he ever saw her, but at the same time no right-thinking man would be willing to take as wife a woman pregnant by another.

Nor do we overlook defendant's claim made in her testimony that plaintiff had agreed to marry her, and that the marriage took place pursuant to that agreement, rather than as a result of fraudulent statements. While she testifies that he spoke to her of love and "all that stuff," and it is admitted that he addressed her in his letters as "My dear Margaret," it is a significant fact that none of the letters passing between them were preserved by either party. Their correspondence seems to have been somewhat desultory, their meetings and illicit relations infrequent, until the occasion when defendant claims the child was begotten, and which must have been some time after she became pregnant, if the child was a full-term child, as testified to by the physicians and as we believe it was. On July 17, 1915, defendant came over from Chicago. She telephoned plaintiff, and he came down and met her at the hotel.

It is admitted by both that they sustained illicit relations that evening. Shortly thereafter they went on a camping trip together at Stevensville, near the lake. Here they lived together in a tent for about a week, without a chaperon, and apparently without restraint. Defendant was then pregnant by another man. She returned to Chicago, and there is no testimony from her or any one else that she ever claimed plaintiff was the father of her child until the occasion of her trip to St. Joseph, the following February, which was about three weeks before her confinement. In view of the relations of the parties during the previous summer, it is not to be wondered that plaintiff accepted at par defendant's claim that he was the father of her unborn child, and married her the following day, to, so far as possible, right the wrong he supposed he had inflicted upon defendant, and to give his name to the child he supposed to be his. We are satisfied that there was no promise of marriage, no thought of marriage, between them until this February meeting. Defendant's claim in this regard does not ring true.

It follows from what we have said that the decree of the court below must be affirmed. The appeal has been prosecuted in the utmost of good faith. The question was an open one in this state. Defendant had the right to take the judgment of this court upon it. An allowance of $200 for her attorney's fees will be made. Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289. The calendar entries in the record indicate that the cost of transcript and printing the record has already been provided for. If not, it may be brought up on the settlement of the decree.[18]

WEMPLE v. WEMPLE.

Supreme Court of Minnesota, 1927. 170 Minn. 305, 212 N. W. 808.

Appeal from District Court, Otter Tail County; Carroll A. Nye, Judge.

Action by Daniel S. Wemple against Maud Wilcox Wemple. From a judgment annulling the marriage between the parties, defendant appeals. On the death of plaintiff pending the appeal, his representative was substituted. Affirmed.

[18] Accord: Jackson v. Ruby, 120 Me. 391, 115 A. 90, 19 A. L. R. 77 (1921); Winner v. Winner, 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919 (1920). Contra: Westfall v. Westfall, 100 Or. 224, 197 P. 271, 13 A. L. R. 1428 (1921).

Statutes in several states make pregnancy by another, unknown to the husband at the time of marriage, an express ground of divorce. Without such statutes, however, the American courts have generally annulled the marriage for fraud, if the husband had not had illicit relations with the wife before marriage. Reynolds v. Reynolds, 3 Allen. (85 Mass.) 605 (1862), supra, p. 598.

The English rule is contra. Moss v. Moss [1897] P. 263.

On the subject of misrepresentations concerning, or concealment of, antenuptial unchastity, see Domschke v. Domschke, 138 App. Div. 454, 122 N. Y. S. 892 (1910); Gatto v. Gatto, 79 N. H. 177, 106 A. 493 (1919).

HOLT, J. The appeal is from a judgment annulling the marriage between the parties.

Pending the appeal, plaintiff deceased. His representative has been duly substituted, but in this decision the original plaintiff will be referred to as plaintiff.

There are only two assignments of error which raise reviewable questions in this court. The first is that the evidence does not support the finding: "That there has been no cohabitation between plaintiff and defendant since plaintiff learned of defendant's false and fraudulent representation and concealment as herein before set forth." We think plaintiff's testimony fully justified the finding. Defendant did not testify to the contrary. Cohabitation, within the meaning of this finding, is, of course, more than merely remaining in the same house and preparing meals for both during the three or four days which defendant remained after plaintiff discovered the fraud.

The other assignment of error is: "The judgment is not supported by the findings of fact." This raises the vital question of the appeal. No finding of fact is challenged except the one first mentioned, and that unsuccessfully; hence all the findings of fact must be taken as true and fully supported. A summary thereof may be stated thus: The parties were married on August 9, 1924; plaintiff being then 71 and defendant 49 years. Plaintiff and defendant lived for some years prior to 1920 in Fergus Falls. At that time plaintiff was married and had a large family of grown children; and defendant was living with one G. A. Stalling as his wife. The Stallings thereafter moved to Henning, and then to Minneapolis, Minn. While at Fergus Falls, also at Henning and Minneapolis, the two families visited back and forth and were on very friendly terms. On May 4, 1924, plaintiff's wife died, and shortly prior thereto defendant was deserted by Stalling, who during all the time he was living with defendant as his wife was the husband of another woman. Defendant, learning of the death of plaintiff's wife, wrote him letters of sympathy at first, which soon were followed by those pretending to express great love and affection for him. In short, defendant artfully induced plaintiff to marry her, writing him that she had secured a divorce from Stalling. She had not been divorced, and she fraudulently concealed from plaintiff that all the years she had been with Stalling as his wife the latter had another wife living. Plaintiff would not have entered the marriage, had he known that the Stallings were not lawfully married and divorced.

Section 8581, G. S. 1923, permits annulment of the marriage at the suit of the injured party "when the consent" of such party to the marriage contract "has been obtained by force or fraud, and there is no subsequent voluntary cohabitation of the parties." Where annulment is sought on the ground of fraud, the voluntary cohabitation, which would preclude relief, must be meant such cohabitation subsequent to discovery of the fraud. Courts in this country are not agreed as to what

fraud will furnish grounds for setting aside a marriage. The absence of statute in some states may account for some divergence of views. Precedents from New York would amply justify the decision of the learned trial court. Domschke v. Domschke, 138 App. Div. 454; 122 N. Y. S. 892; Sheridan v. Sheridan (Sup.) 186 N. Y. S. 470; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609. In Massachusetts the rule is rather strict against annulment for fraud. Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119. In this state the fraud which will justify annulment of a marriage has been considered in Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559, Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611, 7 A. L. R. 1501, and in Robertson v. Roth, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342, where the authorities are quite fully cited. They all relate to concealment of insanity or epilepsy, a misfortune for which the party is not to blame. In the Robertson Case it was held that concealment or deception by one of the parties as to defects of character, morality, chastity, habits, temper, or other accidentals, which do not constitute the basis for the marriage relation, does not furnish ground for annulment. Like matters would be birth, social or financial standing, etc. It was further held that fraud which would constitute ground for annulment "must be something that destroys the consent, which blots out all semblance of contract—or it must impose at the time of the marriage upon the one wronged, burdens and obstacles wholly unexpected and of such character that they tend to the destruction of domestic happiness and promote humiliation disclosing a situation intolerable to society and detrimental to the marriage relation."

The sum and substance of the fraud in the case at bar was this that defendant falsely stated that she had secured a divorce and concealed from plaintiff her true relation with Stalling. This fraud did not go to her capacity to fulfill her marriage obligations with plaintiff, for she needed no divorce, since her living with Stalling could not ripen into a common-law marriage so long as his wife lived undivorced. Ordinarily misrepresentation as to a prior status of being divorced or never having been married is not such a fraud as to afford grounds for annulment. This subject is extensively treated in Wells v. Talham, 180 Wis. 654, 194 N. W. 36, 33 A. L. R. 827. There the plaintiff was a devout Catholic, and the defendant falsely stated to him that she never was divorced, though such was the case, and her former husband was living; so that, according to the rules of the plaintiff's church, he had to cease to cohabit with her, or suffer excommunication. It was held not to give cause for annulment of the marriage.[19] In the dissolu-

[19] Accord: Oswald v. Oswald, 146 Md. 313, 126 A. 81 (1924), where the defendant fraudulently represented to the plaintiff, who was a Catholic, that her divorced husband was dead. See, also, Bannon v. Bannon, 50 Wash. Law Rep. 22 (D. C.), 23 A. L. R. 178 (1922).

tion of a lawful marriage, not only the parties, but the state, is concerned. Hence the welfare of society and the rights of innocent parties must be considered. Where marriage has been consummated, there may be interests of children born or unborn. But in determining the sufficiency of the fraud each case must be considered on its own facts.

In the instant case defendant and Stalling had for years held themselves out to plaintiff, to his family, and to the community as living in honorable wedlock. The state was interested in assuming that such was the fact. When it was disclosed to plaintiff that it was untrue, was there not such an unexpected and intolerable burden thrust on him, of a character entirely to destroy his domestic peace and heap humiliation upon him and his family within the language of Robertson v. Roth, supra? It would seem that society require that a person, carrying on for years such meretricious connection, should not, under the false pretense of having secured a lawful divorce from what she had led plaintiff and the community to believe was an honorable status, be allowed to entrap an unsuspecting person into an irrevocable marriage contract. The record is clear that defendant designedly and artfully carried out the fraudulent representation in order to secure rights in plaintiff's property. That she well knew that, unless she represented that she had obtained a divorce from Stalling, whom plaintiff and the state itself were justified in considering her lawful husband, plaintiff never would have consented to a marriage with her. In this case the words in Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211, are fitting:

"No one will suffer by the decree below unless it be the wrongdoer himself. No right or interest of society demands that such a marriage should be upheld."

We may not be ready to go the full length stated in Reeve, Dom. Rel. 206, nor with all said in Gatto v. Gatto, 79 N. H. 177, 106 A. 493, but there is force in the reasoning. In the Gatto Case the language is:

"The public policy of this state, evidenced by the statutes, the decisions, or the general concensus of opinion, does not regard a fraudulent marriage ceremony as sacred and irrevocable by judicial action; it does not encourage the practice of fraud in such cases by investing a formal marriage, entered into in consequence of deceit, with all the force and validity of an honest marriage. While marriage is a contract attended with many important and peculiar features in which the state is interested, and while it is one of the fundamental elements of social welfare, its transcendent importance would seem to demand that wily and designing people should find it difficult to successfully perpetrate fraud and deceit as inducements to the marriage relation, rather than that such base attempts should be regarded as of trivial importance and be wholly disregarded by the courts. Unhappy and unfortunate marriages ought not to be encouraged. Schouler, Dom. Rel. § 24. The successful perpetration of fraud is not deemed to be a subject for judi-

cial encouragement (Lyman v. Lyman, 90 Conn. 399, 411 [97 A. 312, L. R. A. 1916E, 643]), nor is the court authorized to legislate in favor of such a policy."

And Reeve says: "There is no more reason for sanctioning a marriage procured by fraud, than one procured by force and violence. The consent is as totally wanting, in view of the law, in the former as in the latter case."

As tending to sustain the decision herein may be cited Raia v. Raia, 214 Ala. 391, 108 So. 11; Lyndon v. Lyndon, 69 Ill. 43; Christlieb v. Christlieb, 71 Ind. App. 682, 125 N. E. 486; Browning v. Browning, 89 Kan. 98, 130 P. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288; Entsminger v. Entsminger, 99 Kan. 362, 161 P. 607; Brown v. Scott, 140 Md. 258, 117 A. 114, 22 A. L. R. 810. In some of the cases the fact is stressed that there was no consummation; but we deem that unimportant here, because in the nature of things no child could result from the marriage, and, moreover, we think our statute contemplates that voluntary cohabitation subsequent to discovery is what precludes annulment of the marriage induced by fraud. The statutes of some states make this clear beyond dispute, as for example California and South Dakota. See, also, Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

Application was made to this court for temporary alimony, suit money, and attorney's fees pendente lite. Prior to the hearing thereof, plaintiff died. Judgment of annulment of the marriage had already been entered. There remains nothing to litigate except property rights as between plaintiff's heirs or legal representatives and defendant. After plaintiff's death, this action must stand precisely as if it had been commenced after such death by those interested in his estate to annul the marriage. In Farnham v. Farnham, 227 N. Y. 155, 124 N. E. 894, it is said:

"Alimony and counsel fee can only be allowed when the relation of husband and wife exists. The defendant has no husband. He died in June, 1917, and after his death the court had no power to make an order allowing alimony and counsel fee in an action brought to annul the marriage."

Barbee v. Barbee, 187 N. C. 538, 122 S. E. 177, is to the same effect.

Alimony and means to carry on litigation in actions to sever marriage bonds is authorized by statute. Section 8593, G. S. 1923. When the bond no longer exists, the surviving spouse is given no greater privileges in respect to means to carry on litigation of property rights than those possessed by other parties.

The application must be denied.

The judgment is affirmed.

WILSON, C. J. I dissent. In this state fraud which justifies annulment of a marriage has been definitely determined in Lewis v. Lewis,

44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559, Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611, 7 A. L. R. 1501, and Robertson v. Roth, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342. Under the well-established rule a man cannot annul his marriage even though the woman conceals defects of morality or chastity. Yet, in the instant case, where, I believe, the representations would be less productive of domestic grief than false representations leading an ordinary man into marriage with a woman whose life had been sexually impure, an annulment is allowed. Plaintiff's complaint is not based upon the fact that defendant lived with the other man, which was known, but upon the subsequent disclosure that such cohabitation was illegal. This disclosed only the status of the woman's morality, which is not a ground for annulment. It was a restricted immorality. It had no more tendency to destroy domestic happiness or disclose a situation intolerable to society than other acts of immorality or acts concealing personal qualities or character.

This state has definitely aligned itself with the firm Massachusetts rule. Reynolds v. Reynolds, 3 Allen (85 Mass.) 605; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440; Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119. It is the prevailing rule as indicated by the authorities cited in Robertson v. Roth, supra. See, also, Wells v. Talham, 180 Wis. 654, 194 N. W. 36, 33 A. L. R. 827. New York has adopted a less rigorous rule. There is a reason for this as expressed in Wells v. Talham, supra:

"Of course it is well known that in New York there is only one ground for divorce. Owing partly to this fact, cases for the annulment of marriage have often presented to the New York courts instances of extreme hardship, and it is possible that the courts of that state have insensibly been affected by such situations."

I cannot recognize the conclusion reached as being in harmony with the general rule. It seems to me that it is a complete change from our former holdings and puts us with the New York group where we do not belong. The New York rule gives great weight to the claim that the complaining party would not have entered into the contract if the real facts had been known. This is neither the test nor the true rule. It is fundamentally wrong. Fraud as used in the annulment statute is not fraud as usually understood in its application to contracts generally. The marriage contract as embraced in this statute must be regarded as an institution of society. Story, Conflict of Laws, § 108; Wells v. Talham, supra. The field of operation of the annulment statute should not be thus broadened. I regret that my associates have concluded, in substance, that each case of this character must stand upon its own facts. The result tends to increase annulment actions. I think it much better to have a well-defined general rule, as I supposed we had, so that the bar may advise with some certainty the propriety of instituting such an action. In my judgment the fraud in this case did not go to the

essentials and material elements on which the marriage relation rests. Robertson v. Roth, supra; Davis v. Whitlock, 90 S. C. 233, 73 S. E. 171, Ann. Cas. 1913D, 538; 26 Cyc. 905.[20]

BROWN v. SCOTT.

Court of Appeals of Maryland, 1922. 140 Md. 258, 117 A. 114, 22 A. L. R. 810.

Appeal from Circuit Court, Cecil County, in Equity; Lewin W. Wickes, Judge.

Suit by Aurelia C. Brown against Earl Wesley Scott, alias Joseph Earl Wesley Scott, alias Paul Worthington, and alias Caleb Bragg, for annulment of marriage. From decree refusing annulment, plaintiff appeals. Reversed and remanded, with directions.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and OFFUTT, JJ.

OFFUTT, J. The only question presented by the appeal in this case is whether the fact that the marriage between the parties would not have been contracted by the appellant but for her belief, induced by false statements and fraudulent concealment on the part of the appellee, that he was a respectable citizen, whereas actually he was a convicted felon, and had even then committed crimes for which he was afterwards sentenced to the federal penitentiary, was sufficient ground for the annulment of the marriage contract between them, when it also appeared that the appellant, as soon as she learned of the fraud, severed her relations with the appellee and repudiated the marriage.

The facts out of which that question arises are these:

In November, 1918, Aurelia C. Brown, then 18 years of age, lived with her parents at Germantown, a suburb of Philadelphia, where she attended the Walnut Lane School as a day student. On the 29th of that month she was introduced by the usual "girl friend" at the Adolphia Hotel to the appellee, who then went under the name and title of "Lieutenant Earl Wesley Scott." His personal appearance, manners, and conversation, as well as the air of romance that he becomingly wore as a wounded hero of the Great War, made a profound and pleasing impression, not only upon Miss Brown, but upon the members of her family, as indicated by the following extracts from their testimony: Mrs. Matilda Heath Brown, the grandmother of Miss Brown, said:

"He was tall and handsome, light hair, blue eyes, pretty teeth, and very attractive manners. * * * He certainly had the power of attracting most any woman, particularly as she became impressed with the various events of his career and the eloquent way he described them."

20 See Robertson v. Roth, 163 Minn. 501, 204 N. W. 329, 39 A. L. R. 1342 (1925), on concealment of diseased mental condition as fraud.

Concealment of serious chronic venereal disease is generally held to be fraud. See 5 A. L. R. 1022.

Mrs. Fanny C. Brown, her mother, said: "He was a very attractive looking boy; looked like a college athlete; blue eyes, wavy hair, beautiful teeth, and remarkable conversational powers."

While the appellant herself added this to the symposium:

"He was about 5 feet 9 inches, and weighed about 160 pounds, with very blond hair, blue eyes; he was very well dressed in a brown suit and overcoat, black shoes; he wore a wrist watch, and was very good looking."

After their introduction on the occasion referred to, Scott and Miss Brown frequently met, and in the course of these meetings he gave her this very spirited account of his life and experiences:

"Enlisted in 1914 in the Royal Flying Corps among the first ones, and had been four years in the service of the front. He said that he was a Harvard student and quarterback on the football team. He influenced seven of his chums to enlist. He told how all his chums were killed, and he was the only one left; how one of his chums had been wrecked in a plane and had gone down behind the German line. He told how he felt responsible for these lads. He said, sometimes when he was alone, he would see their dying faces and hear their dying words; sometimes in the night he would wake up and think he was over there and see the dying eyes of the Germans. He spoke of how he suffered in the mud, the rain, and the cold. He told how in the hospital at the front it was just like a bloody death, with all the guns and the noises and sounds in the hospital. He told how he was sent from the hospital in the front to England and then to Canada, and he was discharged from there, and had a pension given to him by the English government. He said he was in the hospital the day it was first reported the armistice was signed, and he left the hospital that night and came to the United States, and in Buffalo he tried to enlist in the American army and due to his injuries he was put in the Secret Service of the United States, instead of in the army, at a salary of $5,000 a year. He also said that at the time I met him he was working for the Sun Shipping Company at Chester under orders from his chief, and he received a salary there which he was allowed to keep. He was supposed to get information in regards to slackers and profiteering. He got his information there, and stayed at the Walton Hotel, awaiting orders from his chief. He was afraid his money would not hold out, because several back checks had not been received from the government. He also said that he was in Harvard at the time the war broke out, and gave me various accounts of his different experiences and his interest in football. He spoke with a Bostonian accent, and said he was born in Malden, Mass., and had lived for a while in Boston; that his family had spent summers in Atlantic City at the Haddon Hall Hotel."

Miss Brown was so much affected by the combined force of his personal charms and this stirring tale of varied adventure that instead of going to school on November 19, 1918, as her family thought she did, she eloped with the appellee. They first went to Media to be married,

but could find no one to marry them there, because the appellee was "too young," and from there they went to Elkton, where they were married by "Rev. McElmoyle." After the marriage she returned home and to school "as usual." This state of affairs continued until December 24th of the same year, when her father confronted her with proofs of the marriage, and on December 27th Scott was arrested at the Hotel Walton on a charge of impersonating a government officer. On the 26th of December, at her father's request, the appellant spoke to Scott over the telephone, and besought him to tell her more about himself and his family. He replied that all the things he had told them were "bunk and war whoop," which indeed proved to be the case. Upon an investigation it was discovered that Scott was an ex-convict, who had under various names led a life of crime since his boyhood. He had been convicted in the criminal court of Cook county, Ill., of larceny in 1914, and had been sentenced to the Illinois State Reformatory for the "maximum term fixed by the statute." He had been convicted of a similar crime in Philadelphia in 1913, and had been sentenced to a term of from 1 year to 15 months in the Eastern Penitentiary of Pennsylvania, and there is evidence in the record of doubtful value that he had been convicted of other crimes prior to 1918, but because of the character of the evidence we will not refer particularly to them. His photograph was filed in what was described as the "Rogues Gallery" of the Eastern Penitentiary of Pennsylvania, and he was known to the police of Philadelphia, Chicago, and other places as a criminal.

Scott was arrested at the Hotel Walton on the charge of impersonating a federal official, and was subsequently tried and convicted of that offense and sentenced to six months in the Mercer county jail. Upon his release he was tried and convicted in the District Court of the United States for the Middle District of Pennsylvania on the charge of falsely pretending, on November 15, 1918, to be an officer and employee of the Secret Service Division of the Treasury Department of the Federal Government, with intent to defraud Emma E. Flemming, and on the 9th of December, 1919, was sentenced to serve 2 years and 1 month in the United States Penitentiary at Atlanta, Ga.

When he first met Miss Brown, Scott pretended to be suffering severely from wounds received in France, and to quote the record:

"He was introduced as a member of the Royal Flying Corps, who had been wounded in France several months before, and who just came from a hospital in Canada; he showed signs of wounds by a scar on his forehead and on his mouth, and his whole left side was affected; he walked with a slight limp, and couldn't use his left hand to any extent. It would take him about five minutes to get up from a chair, and he would gasp with agony. On the street he would have to stop with apparent pain."

These appearances, however, were entirely misleading and false and only adopted by Scott as a part of the pose which he had assumed, and were designed to give an appearance of verity to the story which he told.

The appellant stated in her testimony that she was induced to marry the defendant by his fraudulent representations, and that, had she known who he was, she would not have married him.

Relying upon these facts the appellant filed her bill of complaint in the circuit court for Cecil county, asking for the annulment of the marriage. The defendant, who was then in the Federal Penitentiary at Atlanta, Ga., although given actual and constructive notice of the suit, interposed no defense, and a decree pro confesso was taken against him. Testimony supporting the bill was filed, and the case submitted for final decree. The lower court in a very careful opinion reached the conclusion that the facts referred to by us were not sufficient to warrant an annulment of the marriage, and accordingly dismissed the bill, the reason assigned for that conclusion being that no fraud, however gross its character, which merely induces consent to a marriage, is material in a proceeding for annulment, and in support of that position the case of Moss v. Moss (1897) P. D. 268, was cited.

Briefly restated, the material and essential facts involved in a review of this decree are these: An unscrupulous and plausible swindler, prepossessing in appearance, and with the easy manners and flowing speech of his kind, secured an introduction to a school girl whose discretion in no wise exceeded her years. At that time, not only was he an ex-convict with a long criminal record, but had even then committed other crimes, for which he was afterwards imprisoned. This was his real character, but this character he concealed from the appellant, and to render the deception more secure he told her the false and wholly fabricated story of his life, which he afterwards characterized as "bunk," and at the same time artfully simulated the appearance and actions of a wounded soldier. By such means he secured her confidence, and induced her to go through a clandestine marriage ceremony with him, which she would not have done had she known the truth. We cannot agree with the lower court that these facts are not sufficient to warrant the annulment of the marriage. The record unquestionably shows that the marriage was induced by a deliberate fraud.

One line of cases, of which Moss v. Moss, supra, is illustrative, holds that such a fraud, one which merely induces consent to the marriage is not ground for avoiding a marriage contract, and that rule is very clearly stated by Sir F. H. Jeune, president, in these words:

"But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. * * * In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. * * * But when there is consent no fraud inducing that consent is material."

The overnice and tenuous refinements resorted to in this case to support the conclusion that while fraud is ground for avoiding a marriage where the consent to it is apparent, but not real, it is not a ground where the consent is real, but induced by fraud, are in our opinion unnecessary and contrary to legal principles long established and very generally recognized. In the cases referred to by the court in reaching that conclusion fraud was not even a necessary element, but only an incident of the principal and essential fact upon which those cases turned, which was the want of consent. As, for instance, where one party to the marriage pretended to be another, or where one party was weak-minded and did not understand the contract, or where the parties went through a real marriage ceremony, believing it to be only a mock ceremony. In such cases the real ground for relief is the want of consent, and if that be shown it is immaterial whether it be accompanied by fraud or not, because there can be no contract unless the parties to it consent to its terms, and where it appears for any reason that the parties did not consent there is no contract. The fault of the reasoning and the rule adopted in Moss v. Moss is that in effect it ignores the influence fraud may have in preventing the real consent or agreement of the parties to the contract. Fraud may be as effectual in preventing actual consent as mistake or a want of capacity, and where such is the fact in dealing with ordinary contracts its effect is to vitiate and invalidate them, and there seems to be no good reason why it should not have the same effect upon a marriage contract. This view is very forcibly expressed in Scott v. Seabright, 12 P. D. (1887) 23, where it is said:

"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is that in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriage should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided."

In Moss v. Moss, supra, decided in the same court 10 years later, this criticism of the decision in Scott v. Seabright appears:

"Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that in the case of marriage as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all."

But while it may be possible to project as a pure abstraction a distinction between a fraud which induces consent and a fraud which induces the appearance, but not the reality, of consent, the application of such a principle to actual concrete cases would result in much confusion, uncertainty, and injustice.

A case of an apparent but not a real consent, which is frequently used to illustrate the distinction is where a person is induced to think that a marriage is with one person, where in fact it is with an entirely different person, really does not support the distinction at all. In that case there is of course no real consent. That is there is a physical consent in which the mind does not concur because it is not cognizant of the real nature of the contract, but believes it to be a different thing from what it actually is. But that may also be equally true of a fraud which induces consent to a contract. That is, if by fraud a person is induced to assent to a proposition or an offer which is quite different from what it appears as the result of the fraud to be there is no real consent.

As where a person as in Moss v. Moss was fraudulently led to believe he was contracting marriage with a chaste woman when at the time of marriage she was pregnant by another man, there was the same want of real consent, as in Scott v. Seabright, where the contract of marriage was made because the woman as a result of fraud believed that unless she married she would be subjected to bankruptcy proceedings and exposure. In the one case the error related to the parties, in the other to the consideration which induced the marriage. In neither case did the parties actually consent to what as a result of fraud they appeared to agree to. And yet the same court avoided the contract in Scott v. Seabright and sustained it in Moss v. Moss.

But whatever may be the law of England in respect to the effect of fraud on a marriage contract, the rule in force in this state is that a marriage procured through fraud may be avoided. In Le Brun v. Le Brun, 55 Md. 496, in speaking of the jurisdiction of a court of equity to annul a marriage on that ground, it is said:

"If the marriage be procured by abduction, terror, fraud, or duress, the court, in declaring it a nullity, acts in virtue of its general jurisdiction in matters of fraud affecting contracts."

And in Ridgely v. Ridgely, 79 Md. 307, 308, 29 A. 600, 25 L. R. A. 800, it is said:

"Undoubtedly in the eye of the law marriage is a civil contract differing from other contracts in the circumstance that it cannot be rescinded by the mere consent of the parties. Being then a contract, it seems to follow that where it has been procured by fraud or duress, it may be set aside by a court whose inherent jurisdiction gives it authority to annul any ordinary contract procured in the same way; provided the application be promptly made and before a consummation of the marriage by voluntary cohabitation."

In the case last cited it will be noted that in speaking of the jurisdiction of courts of equity to annul marriage contracts it was said that it

attached in cases where application was promptly made before a consummation of the marriage by voluntary cohabitation, but that language was not intended to exclude cases where the actual status of the parties had not been changed by the intervening rights of children born or unborn, and where the application for relief is made promptly upon the discovery of the fraud. If then courts of equity in this state have the power to avoid a marriage procured by fraud, the question arises as to what is the nature and kind of fraud that will warrant the exercise of that power.

In dealing with that question the age and mental condition of the person injured by the fraud are important and at times controlling factors, since it is a matter of common knowledge that persons of immature years, or those whose wills are weakened by age or disease, are more easily duped by designing people than are mature persons in the enjoyment of normal health and vigor. 26 Cyc. 906.

Where fraud is recognized as a ground for the annulment of a marriage contract, it must be of such a character as to go to its very essence, and affect the free consent thereto of the injured party, and therefore in any inquiry as to the existence of such fraud the capacity of the party upon whom it was practiced is a material fact.

In determining what facts will constitute such a fraud there appears to be no rule more definite than this, that is, that where the misrepresentations or fraud relate to accidental matters such as rank, fame, fortune, habits, temperament, or the like, they do not go to the essence of the contract, and are not sufficient but where the fraud relates to essential matters necessarily affecting the health or well-being of the parties themselves or any offspring from the marriage it is sufficient. The application of these principles may be illustrated by referring to a few cases in which this question has arisen. In Cox v. Cox (N. J. Ch.) 110 A. 924, where a girl 17 years of age was fraudulently induced by the defendant's mother, to whose care she was intrusted, to marry her son, upon application prior to the consummation of the marriage it was annulled.

In Christlieb v. Christlieb, 71 Ind. App. 682, 125 N. E. 486, a girl 16 years of age was induced, by the defendant's representations that he had never been married and had no children and was of good character, to marry him. These representations were false, and because of that fraud, taken in connection with the youth of the complainant, the marriage was annulled.

In Lyndon v. Lyndon, 69 Ill. 44, the defendant, who was a coachman, fraudulently induced the 15 year old daughter of his employer to marry him. In securing the marriage license he committed the crime of perjury, of which crime she had no knowledge. In an opinion annulling the marriage the court quoted with approval the opinion in Robertson v. Cole, 12 Tex. 356, in which it is said:

"The license under which the officer of the law was officiating, was not issued in good faith or on truthful statements, but on misrepresen-

tations and false oaths. * * * Can the law condemn this victim of deception to a perpetual association with the criminal by whom she has been inveigled into what, as to her, should be regarded as a mere mockery of marriage? If so, the boast of the law, that all its partialities expire in its antipathy to fraud, will be but mere idle words, having no foundation in truth."

In Gatto v. Gatto, 79 N. H. 177, 106 A. 493, the defendant induced the plaintiff to marry her by fraudulently representing to him that she was a chaste woman. After the consummation of the marriage she informed him that she had been guilty of incest. In sustaining a decree of annulment, the court said:

"As marriage is deemed to be a civil contract, and not a sacrament, fraud in a material respect which prevents a substantial meeting of the minds of the parties in an intelligent agreement for marriage cannot be said to be immaterial, or beyond the province of the court to correct by a decree of annulment.

"The public policy of this state, evidenced by the statutes, the decisions, or the general consensus of opinion, does not regard a fraudulent marriage ceremony as sacred and irrevocable by judicial action; it does not encourage the practice of fraud in such cases by investigating a formal marriage, entered into in consequence of deceit, with all the force and validity of an honest marriage. While marriage is a contract attended with many important and peculiar features in which the state is interested, and while it is one of the fundamental elements of social welfare, its transcendent importance would seem to demand that wily and designing people should find it difficult to successfully perpetrate fraud and deceit as inducements to the marriage relation, rather than that such base attempts should be regarded as of trivial importance and be wholly disregarded by the courts. Unhappy and unfortunate marriages ought to be discouraged. Sch. Dom. Rel. 24. The successful perpetration of fraud is not deemed to be a subject for judicial encouragement (Lyman v. Lyman, 90 Conn. 399, 411, 97 A. 312, L. R. A. 1916E, 643), nor is the court authorized to legislate in favor of such a policy."

In New York in a line of cases of which Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609, is representative, it is held that a marriage contract is not excepted from the general rule that any fraudulent misrepresentation of a material fact is sufficient ground for avoiding a contract induced thereby. While we are not to be understood as adopting in their entirety the conclusions reached in the cases referred to, they are cited as supporting the principle that where a fraud practiced upon a person of immature years or weak mind of such a character as to necessarily affect the health or well-being of the person injured, and where the true facts are such that no person of ordinary prudence would have made the contract with knowledge of them, induces such person to enter into a marriage contract, that contract may be avoided upon the application of the in-

jured person, provided the application is made promptly upon the discovery of the fraud, where the status of the parties has not been affected by the intervention of the rights of children born or unborn.

Applying these principles to the case before us, we have no difficulty in reaching the conclusion that the marriage between the parties to this appeal should be annulled.

There could be no more cruel or injurious deception or one more seriously and permanently affecting the marriage relation that that practiced upon the appellant in this case. She was led by the appellee to believe that he was an honorable and honored member of society, who had served and suffered in the defense of the nation in foreign lands, with whom she might reasonably have expected to live a happy and useful life. In reality he was a professional swindler, whose life had been largely spent in penitentiaries and reformatories, and who was shortly after the marriage arrested, convicted, and sentenced for crimes he had committed before he met the appellant. Not only would life with him under such circumstances be abhorrent to a person of ordinary instincts and refinement, but every purpose of the marriage relation would be defeated.

To approve and sanction a fraud so gross and destructive and to condemn this school girl to live out her life bound by the ties of marriage in an alliance so degrading would be revolting to the common sense of justice, and would profane the very marriage relation itself. She was, it is true, culpably imprudent and indiscreet, but she was only a child, and therefore peculiarly an object of the solicitude and protection of a court of chancery, and the appellee should not be permitted by it to retain the profits of his fraud, which succeeded only because of that very imprudence and want of discretion so often associated with youth, upon which he relied.

For the reasons given the decree appealed from must be reversed, and the cause remanded, in order that a decree annulling the marriage between the parties may be passed.

Decree reversed, and cause remanded for the passage of a final decree in conformity with this opinion. Costs to be paid by the appellee.[21]

[21] Accord: Corder v. Corder, 141 Md. 114, 117 A. 119 (1922); Ysern v. Horter, 91 N. J. Eq. 189, 110 A. 31 (1920); Dooley v. Dooley, 93 N. J. Eq. 22, 115 A. 268 (1921); O'Connell v. O'Connell, 201 App. Div. 338, 194 N. Y. S. 265 (1922). See Reynolds v. Reynolds, 171 Minn. 340, 214 N. W. 650 (1927), where defendant misrepresented to the plaintiff that he had secured his divorce from his former wife more than six months before, and perjured himself by so stating in his application for the marriage license. The marriage was valid, so far as the divorce was concerned, but the court annulled it for the fraud committed upon the plaintiff.

In Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119 (1921), the court refused to annul a marriage for fraud, where the defendant had met the plaintiff on a journey, assumed a fictitious name, given a false residence and history of himself and of his financial and social standing, married her, and lived with her for seven days, and had never been seen since.

TRUIANO v. TRUIANO.

Supreme Court, Special Term, Warren County, 1923. 121 Misc. Rep. 635, 201 N. Y. S. 573.

ANGELL, J. Plaintiff asks in this action the annulment of her marriage to defendant, which took place November 17, 1919, upon the ground of fraud, in that defendant prior to the marriage represented to the plaintiff that he was a citizen of the United States, whereas in fact he was not. Plaintiff, prior to her marriage to defendant, was an American citizen. The evidence produced satisfactorily established that defendant prior to the marriage represented to plaintiff and her family that he was a citizen, and that plaintiff did not discover the contrary to be true until the spring of 1922, when she endeavored to have defendant register to vote at a municipal election about to be held in the city of Glens Falls. Then defendant admitted that he was not a citizen of the United States and stated that he did not intend to become one. Immediately upon discovering that defendant was not a citizen, plaintiff ceased to live or cohabit with him, and has never done so since. There is no issue of the marriage.

Plaintiff testified that she would not have married defendant if she had not believed his representations regarding his citizenship to be true, and that such representations induced her to consent to the marriage. Plaintiff was at the time of her marriage, and had been for some years prior thereto, a school teacher, with a license to teach in this state. Education Law, § 550, subd. 3 (as added by Laws 1918, c. 158, and amended by Laws 1919, c. 120, and Laws 1922, c. 315), provides that no person shall be employed or authorized to teach in the public schools of this state who is not a citizen. Plaintiff continued to teach after her marriage. This fact is of strong probative value upon the question of her reliance, in entering the marriage state, upon the representations made by defendant regarding his citizenship.

A federal statute in force at the time of the marriage provided that an American woman marrying a foreigner shall take the nationality of her husband. Barnes' Fed. Code, § 3402, 34 Stat. 1228, c. 2534, § 3 (U. S. Comp. St. § 3960). Under that statute plaintiff, though an American citizen prior to her marriage, could not resume that citizenship while the marriage relation continued. United States v. Cohen, 179 F. 834, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829. Since the time plaintiff separated from defendant federal statutes have been enacted relieving married women from the loss of citizenship because of marriage to a foreigner. Thus the Married Women's Citizenship Act of 1922 (42 Stat. 1021, c. 411), in effect September 22, 1922 (42 Stat. 1022, § 3; Barnes' Fed. Code, § 3401, 1923 Supp. p. 223 [U. S. Comp. St. Supp. 1923, § 3961a]), provides that after the passage of that act a female citizen shall not cease to be such by reason of her marriage to a foreigner. Still further relief is given by the same act of

Congress, in effect the same date (chapter 411, § 4, 42 U. S. Stat. at Large, 1022; Barnes' Fed. Code, Cumulative 1923 Supp. p. 244, § 3742a [U. S. Comp. St. Supp. 1923, §§ 4358a–4358d]), which provides that a woman who has lost her citizenship because of marriage to a foreigner may be naturalized.

These subsequent enactments, however, cannot relieve defendant of the fraud, or cause denial to the plaintiff of the relief which she asks, if, in fact, the fraud was of such a nature as to entitle her to annulment of the marriage. That the fraud was of such a nature seems clear. The plaintiff was an American citizen. It is easy to conceive that she would not surrender her citizenship by marriage to a foreigner who was not a citizen. Not only may she well have had proper pride in her citizenship, but citizenship was necessary to the pursuit of her profession, which she had followed prior to her marriage, and which she continued to follow for some time subsequent thereto, under the mistaken belief that she was still a citizen. It cannot be that a foreigner may thus fraudulently effect the expatriation of an American citizen. A fraud perpetrated in contracting a marriage, which results in such expatriation, certainly goes to the essence of the marriage contract.

It is sufficient if the fraud be such that, had it not been practiced, the marriage contract would not have been made, or the transaction of marriage completed. Weill v. Weill, 104 Misc. Rep. 561, 172 N. Y. S. 589. The relations of the parties antecedent to the marriage contract are relations of trust and confidence, and a false representation respecting a fact material to the contract cannot be tolerated. Plaintiff has brought herself within section 1139 of the Civil Practice Act, which provides for the annulment of a marriage when the consent of one of the parties thereto is obtained by fraud, where the parties have not voluntarily cohabited as husband and wife with a full knowledge of the facts constituting the fraud.

Judgment for plaintiff, annulling the marriage.

Judgment accordingly.[22]

[22] In Rubinson v. Rubinson, 110 Misc. Rep. 114, 181 N. Y. S. 28 (1920), it was held that, where the husband promised to have a Jewish ceremony, after the civil ceremony, but refused to do so, the marriage would be annulled for fraud. Contra: Schachter v. Schachter, 109 Misc. Rep. 152, 178 N. Y. S. 212 (1919); Feinman v. Feinman, 72 N. Y. L. J. 899 (1924). Cf. Samuelson v. Samuelson, — Md. —, 142 Atl. 97 (1928).

In Mirizio v. Mirizio, 242 N. Y. 74, 150 N. E. 605, 44 A. L. R. 714 (1926), it was held that a husband was not obliged to support a wife who refused to cohabit with him because of his refusal to carry out his agreement to have a Catholic ceremony. See, also, Mirizio v. Mirizio, 248 N. Y. 175, 161 N. E. 461 (1928).

In Anders v. Anders, 224 Mass. 438, 113 N. E. 203, L. R. A. 1916E, 1273 (1916), Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184 (1917), and Moore v. Moore, 94 Misc. Rep. 370, 157 N. Y. S. 819, marriages were annulled for fraud, where one of the parties, at the time of the ceremony, had no intention of living with the other.

(H) Duress or Mistake

FORD (falsely called STIER) v. STIER.

High Court of Justice. [1896] Prob. Div. 1.

Petition of Ella Louise Ford for a declaration of the nullity of the marriage solemnized between her and the respondent William Douglas Somerset Keppel Stier. The case was tried by Gorell Barnes, J., without a jury. The respondent did not appear.

Gorell Barnes, J. This case is a very remarkable one. The petitioner claims a declaration of the nullity of the marriage solemnized between her and the respondent at St. Mary Abbot's Church, Kensington, on June 5, 1889, on the ground that, owing to the duress to which she was subjected by her mother and the respondent, she was not a free agent in going through the ceremony.

It appears that the respondent had never spoken of marriage to the petitioner, or professed affection for her. She had met him only a few times. She was a girl of seventeen, inexperienced, of a nervous temperament, and much under the influence of her mother, a woman of strong character. The respondent and the petitioner's brother started for South Africa on June 1. They missed the steamer and returned to London. On June 4 the respondent obtained a marriage license, stating in his affidavit that the petitioner's father had given his consent. The petitioner's father had never heard of the matter, and the respondent misstated his name in the affidavit.

According to the petitioner's statement, on June 5 her mother told her that they were going out for a drive. They drove to St. Mary Abbot's, and there she was induced to go through the ceremony which has led to this suit. She says that she thought it was a betrothal, and objected to going through even that ceremony with the respondent, as she did not know him, but was so much under her mother's influence that she did as she was told. She declares that she said in the respondent's presence that she did not wish to be betrothed to him, and that he said, "Do as your mother tells you." The clergyman who officiated has not been called, but her manner does not seem to have attracted attention. She says that after the service she threw away the ring, and went home, that she has never seen the respondent since, and that the only member of the family who then knew what had happened was her mother. Her mother is now dead.

The petitioner's brother left for South Africa with the respondent on the day of the marriage. He states that on his arrival the respondent told him of the marriage, that he quarrelled with the respondent in consequence, and that on his return he mentioned the matter to no one but his mother, who told him to say nothing about it. The petitioner's father never heard of the marriage till he received the respondent's letter in 1893. He then sent for his daughter, who had in the meantime married Mr. Ford. The solicitor's evidence shews

that the statement which she then made was substantially the same as that which she has made in Court.

I have seen the petitioner in the witness-box and am satisfied that she has given her evidence in good faith. Her case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so." I find that this was so, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and in so doing was to such an extent under the influence of her mother and the respondent that she was not a free agent. I therefore pronounce a decree nisi of nullity, with costs against the respondent.[23]

[23] In Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521 (1905), there is a review by Vice Chancellor Pitney of some of the English and American cases on duress.

In Fratello v. Fratello, 118 Misc. Rep. 584, 193 N. Y. S. 865 (1922), the duress was by threat of bodily harm. In Warren v. Warren (Sup.) 199 N. Y. S. 856 (1923), the duress was by a threat to make disclosures to the plaintiff's father, which, on account of his heart trouble, might have killed him.

Generally, marriage to escape a threatened prosecution for seduction, or a bastardy charge, is not under duress. Williams v. State, 44 Ala. 24 (1870); Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191 (1889); Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866 (1908); Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168, Ann. Cas. 1916E, 920 (1915); Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706 (1904); Seyer v. Seyer, 37 N. J. Eq. 210 (1883). But see Smith v. Smith, 51 Mich. 607, 17 N. W. 76 (1883); Collins v. Collins, 2 Brewst. (Pa.) 515 (1869); Shoro v. Shoro, 60 Vt. 268, 14 A. 177, 6 Am. St. Rep. 118 (1888).

Duress by third persons upon one party, which was not known to the other party, is not a ground for annulment. Schwartz v. Schwartz, 29 Ill. App. 516 (1889); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658 (1917); Sherman v. Sherman (Com. Pl.) 20 N. Y. S. 414 (1892). Compare Marks v. Crume, 29 S. W. 436, 16 Ky. Law Rep. 707 (1895); Fowler v. Fowler, 131 La. 1088, 60 So. 694 (1913). A note in 43 L. R. A. 814, collects the cases on duress as affecting marriage.

On undue influence as a ground for annulling a marriage, see Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211 (1898).

On mistake as to the nature of the ceremony, see Clark v. Field, 13 Vt. 460 (1841).

CHAPTER 3

DIVORCE

SECTION 1.—THE EARLY HISTORY OF DIVORCE[1]

In Roman Catholic times, that is, until the reign of Henry VIII, marriage was regarded by the church as a sacrament, and as therefore indissoluble. This being the view of the canon law, it was applied by the ecclesiastical courts in England, which had jurisdiction over matrimonial causes. However, the ecclesiastical courts did grant a sort of judicial separation, known as divorce a mensa et thoro. Such a divorce might be had by either husband or wife, when the gross misconduct of the other spouse, such as adultery or cruelty, rendered it impossible for them to live together. It was necessary to establish by the strictest proof not only that the offense complained of had been committed, but that the parties were not colluding to escape their marital obligations, that the complaining party was free from guilt, and that the offense had not been condoned. Hence a divorce a mensa et thoro could not be had solely upon the confessions of the parties themselves, nor if collusion, connivance, condonation, or recrimination could be proved.

The effect of such a divorce was not to dissolve the marriage bond, but only to authorize the separation of the parties. It did not bar the wife of her dower nor the husband of his marital rights in the wife's property. It did not enable either party to remarry, nor furnish any excuse for unchaste conduct. The court could decree a competent allowance to the wife under the name of alimony, the amount of which would depend on the innocence or guilt of the parties and the financial circumstances of the husband. Such a divorce lasted only until the reconciliation of the parties.

Total divorces, in the sense of decrees completely rescinding valid marriages, were unknown in this period of English history for the reasons indicated above. The ecclesiastical courts did, however, grant decrees of nullity for some lack of capacity which really rendered the

[1] The history of divorce in England may be gathered from the report of the Commissioners appointed by the Queen to inquire into the mode of obtaining divorces a vinculo matrimonii in England. This report was presented to Parliament in 1853, and is found in 64 Lord's Journals, 1852–53, p. 59. An excellent summary of the report appears in "The Practice of the Parliament of Canada upon Bills of Divorce," by John Alexander Gemmill. See, also, 2 Bl. Comm. pp. 440–442.

marriage void from the beginning, and these decrees were called decrees of divorce a vinculo. It should be noted, however, that the causes for which a marriage might be annulled were more numerous before the Reformation than after, since restrictions upon account of consanguinity or affinity were very strict under the canon law, and precontract created by mere espousal per verba de futuro was also a cause for annulment.[2] The situation with reference to annulment was pictured in a statute of the time of Henry the Eighth[3] as follows: "Marriages were brought into such uncertainty that none could be surely knit and bounden, but it should be in either of the parties' power and arbiter, casting away the fear of God by means and compasses to prove a precontract, a kindred and alliance, or a carnal knowledge to defeat the same." This statute limited the forbidden degrees of relationship to those which "the law of God defines," and abolished precontract as an impediment, leaving prior subsisting marriage, corporal or mental incompetency, and relationship within the forbidden degrees as the only grounds for annulment.

The fact that no marital offense, however flagrant, would permit a decree of divorce a vinculo was, of course, the cause of some irritation. There is some evidence that during the last half of the sixteenth century the law and practice was that a divorce for adultery in the ecclesiastical court would so far dissolve the marital relation that the parties might marry other persons. Parr, Marquis of Northhampton, had divorced his wife, Ann Boucher, for adultery. A commission was appointed to inquire whether he might remarry, and, before the commission reported, he did marry Elizabeth Brooke. The commission reported that he might, and Parliament, in 1551, confirmed this opinion by declaring the second marriage "lawful, as by the law of God indeed it was, any decretal, canon ecclesiastical, law, or usage to the contrary notwithstanding." This statute was repealed in the following reign, and "nothing is left of these proceedings except the advised and lasting belief of Cranmer and his associates in Reformation that a more extensive liberty of divorce ought to be allowed."[4] Sergeant Salkeld says:[5] "Divorce for adultery was anciently a vinculo matrimonii; and therefore, in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was that, after a divorce for adultery, the parties might marry again. But in Foljambe's Case, 44 Elizabeth, in the Star Chamber, that opinion was changed. And Archbishop Bancroft, upon the advice of divines, held that adultery was only a cause of divorce a mensa et thoro."

Foljambe, who had married a second time, after divorce, was brought before the Star Chamber in 1601, and it was held that the second mar-

2 See Pollock and Maitland, Hist. of Eng. Law (2d Ed.) p. 385, ff.

3 32 H. VIII, c. 38.

4 Macqueen's Practice of House of Lords, pp. 468 and 792.

5 3 Salk. 138. See, also, 2 Kent Comm. 104, 105.

riage was void; this opinion being agreed to by all "the most wise divines and civilians." [6]

The doctrine of indissolubility, re-established by this decision, operated more severely than before, since, as has been noted above, many of the grounds of annulment which had existed before the Reformation had been abolished. Parties divorced a mensa et thoro were continually seeking some tribunal which could set them wholly free. Mr. Spence has intimated that the Court of Chancery, in the days of the clerical Chancellors, granted divorces a vinculo, but the evidence is inconclusive.[7] In Lukenor's Case, an application was made to Parliament, and an act was passed bastardizing the issue of a wife who had been divorced, and who continued to live in open adultery.[8] In 1666 an act was passed bastardizing the issue of Lady Ann Roos for her adultery. Then her husband secured a divorce a mensa et thoro in the spiritual court. Upon the ground that "there was no probable expectation of posterity to support the family in the male line, but by John Manners, Lord Roos," an act was passed enabling Lord Roos to marry again, and making the children of his second marriage legitimate.[9] This act was strongly opposed by the bishops in the House of Lords.

In the Macclesfield Case,[10] Parliament dissolved the marriage, though the wife, the Countess of Macclesfield, had managed to prevent her husband from obtaining even a divorce a mensa in the spiritual courts. In the Duke of Norfolk's Case,[11] the husband had not succeeded in securing a decree in the ecclesiastical court, but had obtained a judgment at law against his wife's paramour.

In these cases which established the practice of securing divorces a vinculo matrimonii by act of Parliament, the Parliament took evidence and considered the cases in a somewhat judicial fashion, but the proceedings were necessarily crude. In 1798 Lord Chancellor Loughborough framed a series of resolutions for the purpose of establishing some regularity in the procedure in divorce cases in Parliament, which were later adopted.[12] These required that a decree a mensa et thoro should have been pronounced before the bill was solicited, and that the entire proceedings in the ecclesiastical court should be presented in the House of Lords. The petitioner was required to present himself for examination as a witness, with reference to connivance or collusion, and as to whether he had, by abandoning his wife, contributed to her downfall.

[6] Rye v. Fuliambe, Moore, 683 (1601). See 3 Salk. 138, and Kent, op. cit.
[7] Spence, Eq. Jur. of the Ct. of Ch. vol. 1, p. 702.
[8] 13 State Trials, p. 1308 (1700).
[9] Lord Roos' Case, Macqueen, op. cit. pp. 551, 562 (1669).
[10] Macqueen, op. cit. p. 574 (1697–98).
[11] Macqueen, op. cit. p. 562 (1692, 1699, 1700).
[12] Gemmill, op. cit. p. 11.

Only five Parliamentary divorces were granted upon the petition of aggrieved wives.[13] In all of these cases there were aggravating circumstances, in addition to adultery on the part of the husband, which would make future reconciliation impossible. Thus different standards of morality were enforced as between the sexes.

Not until 1858 was there any method of securing an absolute divorce in England, except by a special act of Parliament. The expense and delay which were involved in the necessary preliminary steps, and in securing the passage of the act, were so great that no such divorce could be obtained except by the wealthy.[14] On account of these evils, a commission was appointed in 1850 to inquire into the law of divorce, and this commission reported to Parliament in 1853, and a statute was enacted in 1857 creating the Court of Divorce and Matrimonial Causes.[15]

This court was given jurisdiction in suits for annulment, suits for divorce a mensa et thoro, and suits for divorce a vinculo, together with all other jurisdiction in matrimonial causes. Thus the matrimonial jurisdiction of the ecclesiastical courts was removed to this court, and the practice of granting Parliamentary divorces has become obsolete except in a few cases from Ireland and India.

In the United States, there were no ecclesiastical courts, and American courts of equity did not regard themselves as having jurisdiction in divorce matters, until such jurisdiction was conferred by statutes.[16] Many of the Legislatures, following the English practice, passed special acts of divorce, and such acts were generally held to be constitutional, although they were attacked upon the ground that they impaired the obligation of contracts, and were an exercise of judicial power.[17]

But, though legislative divorces were constitutional, they were apparently regarded as unsound in principle,[18] and Chancellor Kent, in his time, noted that the Constitutions of several states forbade legislative divorces, but recognized the power of the Legislature to confer divorce jurisdiction upon the courts.[19] In our time, legislative divorces are obsolete; in some states, because they are prohibited, and in the others, probably because the Legislatures, having conferred jurisdiction upon the courts to grant divorces by judicial process, could not be induced to deal specially with the marital difficulties of individuals.[20]

13 Gemmill, op. cit. p. 12.

14 Gemmill, op. cit. p. 13.

15 20 and 21 Vict. c. 85.

16 See Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563 (1825).

17 See Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888), for a complete discussion of legislative divorce in the United States. But see Bryson v. Bryson, 44 Mo. 232 (1869); Ponder v. Graham, 4 Fla. 23 (1851); Sparhawk v. Sparhawk, 116 Mass. 315 (1874). In 18 L. R. A. 95, there is a note on the validity of legislative divorce. See Stim. Am. St. Law, §§ 395, 430.

18 See Bingham v. Miller, 17 Ohio, 445, 49 Am. Dec. 471 (1848).

19 2 Kent Comm. 105.

20 In State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St.

SECTION 2.—GROUNDS FOR DIVORCE[21]

(A) ADULTERY

LEVY v. LEVY.

Appellate Court of Illinois, First District, 1885. 16 Ill. App. 358.

WILSON, P. J. This was a bill in chancery, brought by the appellant against the appellee for a divorce, on the ground of adultery. The defendant's default having been entered, the bill was taken pro confesso, and upon an ex parte hearing the bill was dismissed at the costs of the complainant for want of equity.

We have carefully considered the evidence tending to prove the commission by the defendant of the offense charged in the bill, since her marriage with the complainant, and without referring to it in detail, we need only say, that, though mainly circumstantial, it is, in our opinion, sufficient to establish the defendant's guilt.

It appears from the bill of exceptions that, previous to the marriage of the parties, the defendant, to the knowledge of the complainant, was a person of unchaste habits, and that the complainant himself had cohabited with her prior to the marriage, knowing her at the

Rep. 928 (1895), it was held that a general statute, automatically dissolving the marriage of one who was sentenced to life imprisonment, did not violate the provisions of the state Constitution against legislative divorces.

[21] At the outset of the detailed treatment of judicial divorce, it should be said that the interesting and important subject of international and interstate jurisdiction for the purpose of granting divorce is too important for superficial treatment, and receives extended treatment in the course on Conflict of Laws; hence no cases are printed here. See Lorenzen's Cases on Conflict of Laws (2d Ed.) pp. 652–705, in this series of casebooks, and Beale's Cases on Conflict of Laws. Statutes in most of the states prescribe certain jurisdictional facts, such as a minimum period of residence of the complaining party within the state, or the commission of the matrimonial offense within the state or some other specified fact or facts. These statutes vary, indicating substantial differences in the policy of the states, which differences give rise to the question of whether one state should recognize by reason of the rules of international comity, or is compelled by the "full faith and credit" clause of the Constitution of the United States to recognize, the validity of the divorce granted by the courts of the other state or country.

Among the cases usually discussed, on the subject of jurisdiction, are Ditson v. Ditson, 4 R. I. 87 (1856); Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604 (1869); Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794 (1901); Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366 (1903); Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906); Le Mesurier v. Le Mesurier [1895] App. Cas. 517. The following articles are in point: Beale, "Constitutional Protection of Decrees for Divorce," 19 Harv. L. Rev. 586 (1906); Schofield, "The Doctrine of Haddock v. Haddock," 1 Ill. L. Rev. 219 (1906); Peaslee, "Ex Parte Divorce," 28 Harv. L. Rev. 457 (1915), McClintock, "Fault as an Element of Divorce Jurisdiction," 37 Yale L. J. 564 (1928).

time to be a prostitute, but that he subsequently married her upon her promise to reform. Within a few days after the marriage he discovered that she was unfaithful to her marital obligations, and had committed adultery as charged in the bill.

The court below seems to have entertained the view that having knowingly married an immodest woman, though upon her promise of reformation, the husband cannot complain if she be guilty of adultery after the marriage. In this view we are unable to concur. The statute makes the commission of adultery by either party subsequent to the marriage cause for divorce. No exception or reservation is made in favor of or against any particular class of persons. It provides, "that in every case in which a marriage has been, or may hereafter be contracted and solemnized between any two persons, and it shall be adjudged that either party * * * has committed adultery subsequently to the marriage * * * it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract." The language is of general application, and is not to be limited or extended beyond what its terms plainly import. Two years' habitual drunkenness is also made a statutory cause for divorce, but we think it would hardly be contended that if a woman were to marry an habitual drunkard upon his promise to reform she would be thereby estopped from ever complaining, however much he might offend in that respect subsequently to the marriage. No difference in principle is perceived between such a case and the one in hand.

Aside from the promise of the defendant to reform, the vows at the marriage altar are themselves the most sacred promises that thenceforth, forsaking all others, the parties will lead chaste lives, and be faithful to their marital relations. However mistaken the complainant may have been in believing that, by conferring upon the defendant the honorable condition of wifehood, he would thereby restore her to a life of purity, he had a right to rely upon her promise to be true to him. To hold that when she thereafter was found sinning, the complainant is to be forever tied to a woman lost to every sense of decency and gratitude, and whom he had endeavored to clothe with the garment of respectability by making her his wife, is revolting to our sense of justice, and is not sanctioned by any sound rule of law. In Baylis v. Baylis, Law R. 1 Prob. & Div. 395, it is said: "Whatever the previous life of a woman may have been, she binds herself to chastity, and if she breaks the conditions of marriage, her husband is entitled to claim its dissolution." And in 1 Bishop on Mar. and Div. § 179: "In this country, where divorces a vinculo are granted for adultery, it is of little consequence whether the marriage of an unreformed prostitute, to a person whom she deceives as to her character, is to be deemed void from the beginning or not, since it would be annulled on proof of the subsequent adultery." The principle as thus enunciated we think salutary and just, and it is decisive of the present appeal.

The decree of the court below dismissing the bill will be reversed and the cause remanded, with instructions to enter a decree of divorce according to the prayer of the bill. Judgment accordingly.[22]

MATCHIN v. MATCHIN.

Supreme Court of Pennsylvania, 1847. 6 Pa. 332, 47 Am. Dec. 466.

[This was an appeal by a wife, from a sentence of divorce a vinculo matrimonii, by the Common Pleas of Columbia county. The libel charged adultery, with the usual averments of time and circumstances.]

GIBSON, C. J. Though we are bound to determine this appeal on the depositions sent up with the record, they contain enough to warrant a concurrence in the general belief that the appellant was actually insane; for no woman in her senses, however lost to shame, would apprize her husband's kinswoman, by whom her confidence was certain to be betrayed, of an assignation with a paramour. But a wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defence to a libel for adultery, though it would be a defence to an indictment for it. The offence is a social, as well as a moral one; and it is agreed by the civilians to be less grievous to the sufferer, though not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititious offspring on the wife, than it is when committed by the wife, whose transgression may impose such an offspring on the husband; and hence it probably was—though the kindred fault of barrenness was also cause of divorce—that the right of repudiation was confined, in the primitive ages, to the husband; for there is no instance of an exercise of it by a wife till the time of Cicero, or shortly before it. Cooper's notes to Justinian, lib. 1, tit. 9, § 1, p. 435.

A libel for divorce is said to partake of the nature of a criminal proceeding; but the primary intent of it is undoubtedly to keep the sources of generation pure, and when they have been corrupted, the preventive remedy is to be applied without regard to the moral responsibility of the subject of it. It is true, that neither the canon law, nor our own statute, makes any distinction as to sex; but that the legislation of England, to which the dissolution of marriage in that country exclusively belongs, is guided by an opposite principle, is proved by its readiness to divorce for the adultery of the wife, and its reluctance to divorce for the adultery of the husband. There have been but two instances of the latter; and in each of them, the offence was marked with such circumstances of brutality, that a con-

[22] Accord: Wade v. Wade (Mo. App.) 229 S. W. 432 (1921).

tinuance of the nuptial relation would have reflected the disgrace of the husband on the wife. The distinction is said to be preserved in the laws of many other countries; and though it is not expressly preserved in the application of the remedy under our own, we are nevertheless at liberty to conclude that insanity might be a bar to divorce at the suit of the wife, when it would not, in similar circumstances, be a bar to divorce at the suit of the husband. To say the least, adultery committed under the irresistible impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently, erotic mania, would certainly be ground of divorce, though not of indictment.

The great end of matrimony is not the comfort and convenience of the immediate parties, though these are necessarily embarked in it; but the procreation of a progeny having a legal title to maintenance by the father; and the reciprocal taking for better, for worse, for richer, for poorer, in sickness and in health, to love and cherish till death, are important, but only modal conditions of the contract, and no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purposes of the marriage—the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world. The absurdity of the dogma, that marriage is a sacrament, and dissoluble only by the head of the church, instead of a political status subject to the power of the state, is manifest.

So far I have treated the subject as if the evidence made out a case of moral insanity, though, in point of legal effect, it does not. Does it prove the corpus delicti?

Were the wife's confession sufficient to prove it, the evidence of it would be ample; for she distinctly acknowledged it before the session of her church; indeed, she seems to have made only a show of persistence in denying it, and to have considered that she had done nothing very wrong. Considering her bringing up, which is admitted to have been of the most careful and exemplary kind, this dullness of the moral sense seems to have been a defect in the constitution of her mind. It is a rule of policy, however, not to found a sentence of divorce on confession alone. Yet, where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs. There is no doubt as to the nature of the rule, or difficulty in its application to the evidence before us. The facts resulting from it are, the wife's disclosure of the assignation to her husband's kinswoman; her absence at the indicated hour; her visit to a neighbour immediately preceding it; her

abrupt termination of it, and feigned excuse for going; her presence at the appointed time and place in company with the man she was to meet; the shifting of their ground at the approach of an intruder; the disordered condition of her clothes when she came back; her declaration to her confidant the same evening, and confession to the church session next morning—these, together, make up the sum of plenary proof. To say nothing of the confession of her accomplice, which, not having been communicated to her, and confirmed by her, was not evidence to affect her, there was enough for the purpose of inculpation without the confession of either.

It is a fundamental rule, said Lord Stowell, in Loveden v. Loveden, 2 Haggard, 2, that it is not necessary to prove the direct fact of adultery; for, being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt. On this principle, a wife's visit with a man to a brothel, or to a man at his lodgings, has been held sufficient proof of it, because it is impossible to assign an innocent motive for such a meeting; nor can an innocent motive be assigned for meeting a man in the dark at a barn-door, in a secluded alley, with the stealthy and shrinking timidity of conscious impropriety. That the preconcerted design was partly put in act, is as convincing evidence of the consummation of it, as would be the testimony of an eye-witness to the fact. There was nothing but the will of the parties themselves to stop them.

We are of opinion, therefore, that the sentence is sustained by legal and sufficient proof. Sentence affirmed.[23]

[23] Contra: Kretz v. Kretz, 73 N. J. Eq. 246, 67 A. 378 (1901); Laudo v. Laudo, 188 App. Div. 699, 177 N. Y. S. 396 (1919).

In Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352 (1858), Redfield, C. J., said: "We have read the case of Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466, and the opinion of the late Chief Justice Gibson, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground for divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and, as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American republic."

In Wray v. Wray, 19 Ala. 522 (1851), Parsons, J., said:

"Had Mrs. Wray been indicted for the adultery, an acquittal would have been inevitable. But it must be conceded that an insane person is civilly liable for his trespasses. I do not doubt that. It is but just that the person whose misfortune has caused an injury to another should bear the loss; and, in the next place, the quo animo in such cases is immaterial. It was held in Massachusetts, that a husband was not entitled to a divorce on the ground that his wife had committed adultery when insane. [Broadstreet v. Broadstreet] 7 Mass. 474 [1811]. But it was held in Pennsylvania, that the wife's insanity at the time of her adultery was no bar to the husband's libel for a divorce. [Matchin v. Matchin] 6 Pa. 332 [47 Am. Dec. 466 (1847)]. I cannot assent to the latter opinion, although it was delivered by Chief Justice Gibson. It is very true, that a legitimate offspring is one great object of marriage, and that, if a

TAFT v. TAFT.

Supreme Court of Vermont, 1907. 80 Vt. 256, 67 A. 703.

Exceptions from Franklin County Court; John H. Watson, Judge.

Petition for divorce by Winona L. Taft against Russell W. Taft. There was a decree granting the divorce, and the petitionee excepts. Affirmed.

Argued before ROWELL, C. J., and TYLER and MUNSON, JJ., and TAYLOR, Superior Judge.

TYLER, J. Petition for divorce for alleged adultery. Petition sustained, and bill granted. Exceptions by petitionee, for that the decree was based wholly upon circumstantial evidence, and that all the evidence produced by the petitioner did not warrant the decree.

That adultery may be proved by circumstantial evidence, both in civil and criminal cases, is well settled. The only general rule that can be laid down upon the subject is that the circumstances must be such as will lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed. 2 Greenl. Ev. § 40. In 2 Bish. Marr. & Div. 1357, this rule is given: "Though no witness testifies to seeing the adultery, if there are proven facts consistent with the theory of its commission and inconsistent with any other theory, and if they create in the minds of the triors the degree of affirmative belief required by law that it was committed, the evidence will be adequate." Kizer on Marr. & Div. § 70. Bishop says, in volume 2, § 619, that, when a criminal disposition by both parties and an opportunity to commit the act have been shown, adultery may be inferred. See State v. Brink and Gibbs, 68 Vt. 659, 35 A. 492. In the present case the court found that adultery had been committed on two occasions, and,

sane woman act so as to disappoint her husband's object and expectations in this respect, he is entitled to a divorce. In such case she is responsible for her acts and must abide their consequences. If the reasoning of Mr. Chief Justice Gibson had stopped there, no one could object to it. But, if we extend the principle upon which his opinion is chiefly founded to its necessary results, it will be found to be untenable, I think. It would entitle the husband to a divorce, if the wife should become unfruitful from disease, or if another man should gain access to her by force or fraud. In this case advantage was taken of her mental alienation, which can be the cause of no forfeiture of her rights, any more than if a similar advantage had been taken by means of a soporific or of actual force.

"As insanity itself is no cause for a divorce, nothing which is a consequence of it can be."

The cruelty of an insane spouse is not a ground of divorce. McEwen v. McEwen, 10 N. J. Eq. 286 (1854).

Marriage and cohabitation with another by a spouse who in good faith believes that he is divorced and free to remarry is adultery and a ground for divorce. Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. Rep. 294 (1892); Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192 (1910). But where the husband has been absent unheard of for over seven years, and his wife believes him to be dead and remarries, she is not guilty of adultery. Valleau v. Valleau, 6 Paige (N. Y.) 207 (1836).

evidence having been introduced tending to show other occasions when the parties were alone together in the room described, the court remarked that evidence as to other occasions was admissible, whether before or after the acts proved. We assume that from this evidence the court found an adulterous disposition, as it was admissible for that purpose.

It appears that all the evidence tending to show that the parties were in a certain room together on occasions came from persons who had been employed by the petitioner as private detectives. The rule as to the weight to be given to the testimony of persons thus employed is well stated in Blake v. Blake, 70 Ill. 618: "The testimony of a private detective hired by the husband to watch his wife, with a view to learning facts upon which to base a suit for divorce, will be regarded with much suspicion, especially where it does not appear that his pay does not depend upon the successful effect of his evidence." The other cases cited on the petitionee's brief are of the same effect, though some of them say that only slight credibility should be given to such witnesses. Others go to the extent of holding that a bill should not be granted upon the unsupported testimony of such persons. But the correct rule is that such testimony is to be weighed and considered like other testimony, and tried by the same tests, and the fact that a person is a hired witness should be considered by the triors.[24] 9 Am. & Eng. Ency. 412; 2 Greenl. Ev. § 46, note. It cannot be assumed that all the evidence was not fairly considered and weighed by the trial court. It is held in this state that a conviction may be had in a criminal case upon the uncorroborated testimony of an accomplice. State v. Potter and Wife, 42 Vt. 495; State v. Dana, 59 Vt. 614, 10 A. 727. As a rule, the testimony of private detectives is entitled to as much weight as that of accomplices.

There was evidence tending to show adultery. That its weight and sufficiency were for the trial court, and cannot be revised by this court, has been repeatedly decided. Kelton v. Leonard, 54 Vt. 230; Thayer v. Cen. Vt. R. Co., 60 Vt. 214, 13 A. 859; Lewis v. Roby, 79 Vt. 487, 65 A. 524. The rule is stated in Lindley v. Lindley, 68 Vt. 421, 35 A. 349, that the measure of proof required is a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused. That this case was tried in accordance with the rule we have no reason to question.

Decree affirmed.[25]

[24] In Enders v. Enders, 83 Misc. Rep. 593, 145 N. Y. S. 450 (1914), the court refused to grant a divorce on the uncorroborated testimony of a private detective.

[25] A divorce for adultery may be granted upon the uncorroborated testimony of the complainant. Murphy v. Murphy, 150 Mich. 97, 113 N. W. 583 (1907); Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157 (1908). The uncorroborated testimony of the defendant's paramour, if he be credible and worthy of belief, may be sufficient. Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86 (1912),

KERR v. KERR.

Supreme Court, Appellate Division, Second Department, 1909. 134 App. Div. 141, 118 N. Y. S. 801.

Appeal from Special Term, Kings County.

Action by Louise M. Kerr against George F. Kerr. From an interlocutory judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before HIRSCHBERG, P. J., and JENKS, GAYNOR, RICH, and MILLER, JJ.

GAYNOR, J. The evidence is that the defendant went to the Grand Central Station with his hand-bag, met a woman not his wife as she came in on a train at about 3:30 p. m., took her with her hand-baggage to a hotel in a cab, registered her with himself as his wife by his own handwriting, under the name "George Knight and wife, New Haven," had a room assigned to them upstairs in the hotel, and immediately went with her into the lift and up as if to the room, taking their baggage with them. A witness waited in the hotel until midnight to see if he came down, but did not see him. There is no description of the woman, nor of their demeanor toward each other; the attorney for the plaintiff who tried the case seemed to have no notion of the requirements as to evidence in such cases. Though opportunity was shown, inclination, it is said, was not. But seeking such bedroom privacy was evidence of inclination, stronger that any ordinary act of affection between them at the station or in the cab. What did they register in a hotel as man and wife and retire to a bedroom for? We have it of old that "it is presumed he saith not a pater noster" there. Burton's Anat. of Mel. vol. 2, pt. 3, § 3, mem. 1, subd. 2.

The judgment should be affirmed.[26]

semble; Letts v. Letts, 79 N. J. Eq. 630, 82 A. 845, Ann. Cas. 1913A, 1236 (1912), semble.

By the rules of the canon law, a divorce for adultery could not be granted upon the uncorroborated admissions or confessions of the defendant, and this seems to be the rule of the English and American courts. See a note by A. C. Freeman, 30 Am. Dec. 544, discussing the cases and some statutory modifications of the rule in the American States.

In Trough v. Trough, 59 W. Va. 464, 53 S. E. 630, 4 L. R. A. (N. S.) 1185, 115 Am. St. Rep. 940, 8 Ann. Cas. 837 (1906), it was held that admissions of adultery by the defendant are not admissible at all, under the West Virginia statute.

[26] The conventional statement as to the amount and kind of evidence necessary to prove adultery is the statement of Lord Stowell in Loveden v. Loveden, 2 Hagg. Cons. 2 (1810): "It is not necessary to prove the direct fact of adultery; for, being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt." See, also, Zezima v. Zezima, 99 N. J. Eq. 899, 133 A. 406 (1926); Moller v. Moller, 115 N. Y. 466, 22 N. E. 169 (1889).

Statements such as that the circumstantial evidence must be of a "clear and positive nature" are often made. See Brown v. Brown, 27 Idaho, 205, 148 P. 45 (1915); Sharp v. Sharp, 91 W. Va. 678, 114 S. E. 280 (1922); Miller v. Miller, 94 W. Va. 177, 118 S. E. 137 (1923). But see, Ellett v. Ellett, 157 N. C. 161,

Interlocutory judgment affirmed, with costs.

HIRSCHBERG, P. J., and RICH and MILLER, JJ., concur in result.

JENKS, J. (dissenting). I think that the evidence does not support the finding of defendant's adultery with an unknown woman in the Hotel York, in the borough of Manhattan, on May 15, 1907. The evidence is that an entry in the register on May 15, 1907, "George Knight and wife, New Haven, Connecticut," is in the handwriting of the defendant, and that the defendant was seen by a detective in plaintiff's employ to come out of that hotel with a "dress suit case and a lady's hat bag," and to take his way to his office, in "the month of May," on the Wednesday or Thursday prior to the 20th—"it must have been about the 16th."

I think that the evidence does not support the finding of the defendant's adultery with an unknown woman in the Hotel Navarre, in the borough of Manhattan, on May 20, 1907. The evidence is that detectives saw the defendant meet a woman, not his wife, at the Grand Central Station in Manhattan, in the afternoon of May 20th. He and she, with this hand luggage, were driven in a cab to that hotel. One of the detectives saw the defendant and this woman enter the hotel, and while standing five feet away he saw the defendant write in the register "George Knight and wife, New Haven." The witness also saw the defendant and the woman thereupon step into the lift and be taken upstairs. The witness remained "there" until 12 o'clock midnight, and did not see the defendant "come out of the hotel." There were two entrances to the hotel. The witness also testifies, referring to the defendant, "He occupied room 440, I think; I am pretty sure"—and also that the witness attempted to go to room 440, "and such permission was not given" to him.

The witnesses produced by the plaintiff, aside from the clerks of the hotels, who respectively testify to nothing material save the mere entry in the register of the Hotel York and the loss of the register in the Hotel Navarre, were detectives hired by the wife and the brother of the plaintiff, who testified but to the handwriting of the entries in the registers of the hotels. This court has said:

" 'Charges of this kind are only to be established by clear and convincing evidence. They are so serious in their character, and the results so grave, that a court should hesitate before making a finding of guilty, except when thoroughly satisfied of the truth of the charge.' Smith v. Smith, 89 Hun, 610, 35 N. Y. Supp. 556. The law and policy of this state is to preserve the stability of the marriage tie, and release from it only on safe and sound evidence." Keville v. Keville, 122 App. Div. 389, 106 N. Y. S. 993.

72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215 (1911), where the court sustained the plaintiff's exception to a charge that the evidence must be "clear, cogent, and convincing," and said that only a preponderance of evidence was necessary.

See Moller v. Moller, 115 N. Y. 466, 22 N. E. 169; Pollock v. Pollock, 71 N. Y. 137.

It is true that the defendant did not testify as to these alleged occurrences. Elliott on Evidence, § 227, says:

"The failure of the party himself to testify may also have the same effect as the failure to call other witnesses; but mere inaction, when action is not required, as, for instance, until his opponent has sustained the burden of proof, where it rests upon him, is not an admission, and will not justify an adverse inference."

In Shotwell v. Dixon, 163 N. Y. 43, 57 N. E. 178, it was said, per Martin, J.:

"Nor do we think the appellant's other contention, that because the defendants were not sworn as witnesses in the case the court may assume that a cause of action exists without the proof necessary to constitute it, can be upheld. So long as the plaintiff had not established a cause of action against them, they were neither required to make a motion for a nonsuit to protect their rights, nor were they called upon to introduce evidence to contradict or explain facts which were insufficient to establish any liability against them."

(B) CRUELTY

Sir WILLIAM SCOTT in EVANS v. EVANS (Consistory Court of London, 1790) 1 Hagg. Cons. 35–40: "This cause has been carefully instructed with evidence by the practisers, who have had the conduct of it, and has been very elaborately argued by the counsel on both sides. It now devolves upon me to pronounce the legal result of the evidence which has been thus collected, and of the arguments raised upon that evidence—a duty heavy in itself, from the quantity and the weight of the matter, and extremely painful, from the nature and tendency of a great part of it, and from the inefficacy of this court to give relief adequate to the wishes of both parties. Heavy and painful as it is, it is a duty which must be discharged, and which can only be discharged with satisfaction under a consciousness that it is discharged with attention and impartiality, and under the reflection that if, after the endeavours which I have used in cleansing and in instructing my own conscience upon the subject, I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing a mode by which the parties may be relieved against the infirmities of my judgment.

"The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties,

it would be a question easily decided upon first impressions. Everybody must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the first feelings of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case.

"To vindicate the policy of the law is no necessary part of the office of a judge; but, if it were, it would not be difficult to shew that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

"That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life, of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to

be admitted. The rule of 'per quod consortium amittitur' is but an inadequate test; for it still remains to be inquired, what conduct ought to produce that effect? whether the consortium is reasonably lost? and whether the party quitting has not too hastily abandoned the consortium?

"What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and, if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

"Still less is it cruelty where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt; and therefore, though the court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed; of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessaries, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the ecclesiastical court does not look to such matters: the great ends of marriage may very well be carried on without them; and, if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic forum.

"These are negative descriptions of cruelty; they shew only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the court. But, if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from Clarke, and the

other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succours of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect." [27]

HARRIS v. HARRIS.

Consistory Court of London, Hilary Term, 1813. 2 Phill. Ecc. 111.

Judgment—Sir WILLIAM SCOTT. This is a suit for separation by reason of cruelty brought by the wife; there is no defensive allegation on the part of the husband. It is not the habit of the court to interfere in ordinary domestic quarrels; there must be something which makes cohabitation unsafe; for there may be much unhappiness from unkind treatment and from violent and abusive language; but the court will not interfere—it must leave parties to the correction of their own judgment; they must bear, as well as they can, the consequences of their own choice.

Words of menace are different, if they are likely to be carried into effect, the Court is called upon to prevent their being carried on to mischief. Where blows are resorted to, the case is still more aggravated, there mischief is actually done or inflicted to a certain degree.

In the present case it is impossible not to say that there is that species of misconduct which the court notices.

It is proved that for a considerable time the husband used towards his wife words of the most insulting nature; and that they were con-

[27] Cruelty has been made a ground for absolute divorce in practically all the states. In a few it is a ground for divorce a mensa et thoro. The statutes in sixteen states simply specify cruelty, in eighteen, extreme cruelty, in five, cruelty endangering life, in two, extreme and repeated cruelty, in two, cruel or inhuman treatment, in two, intolerable severity, in two, extreme, including mental cruelty, and in one, such treatment that the wife's happiness is destroyed.

stantly used. This is proved by the evidence of the servants, who appear to give impartial testimony, allowing the husband credit for affection to his children, but stating his misconduct towards his wife. I see nothing to lead me to impute undue favour or partiality towards him.

The first matter complained of is an actual blow, though there is no direct evidence of it. What leaves the court fully satisfied that it did occur is the blow in 1803. Her two sisters say that at that period she abstained from her usual visits to them for some time. When she came, they saw marks, and asked her the cause of them; she declined at first to answer their questions, and did not appear eager to complain, but, when pressed, she said she had received a blow from her husband with a poker; this confession of hers confirms the statement made at a later time that her husband had struck her before, which must either allude to this blow or it adds to the number of acts of violence complained of. She bore all with the patience required of a wife—she was degraded from the management of her family; dressed not suitably to her situation in life; obliged to resort to the charity of her own family for a supply of money. "Fool," "devil," and "liar," were the best terms applied to her; words of menace are also proved; he would threaten to throw a knife in her face, when he had a knife in his hand; he would threaten to knock her head off—words which to a mind of greater firmness than her's would occasion alarm.

It has been suggested that she had habits of contracting debts which justified him in taking the management of the family from her; but, when I see the manner in which she was kept as to her own clothes, I do not think these habits other than the husband himself occasioned, if they are true; but they are not satisfactorily proved.

The subsequent facts are clearly established: On the 11th of August there was a quarrel on account of the allowance her father had given her for her own accommodation; the husband wanted to apply this to the use of the family. I do not see that her application of it was other than was intended by her father.

On September 11 there is satisfactory evidence of a blow from a teacup; the child came down stairs and said her father had thrown a teacup at her mother; the witness went up stairs, and found the cup broken, and her face bleeding; he asked the witness what she had heard about it; she told him, and he did not deny the statement; his silence here leaves no doubt of the fact.

On the 14th of October was the last outrage which led to their separation; it happened in the presence of the husband's sister; the dispute arose about the testamentary dispositions of her father—it is a singular circumstance that the sister says she leaned her head on her hand, and did not see the parties. The husband, however, by his own admission to another person, thrust his fist into her face with some violence.

The court is called upon to prevent the repetition of such occurrences. I have no hesitation in pronouncing for a separation.

MASSEY v. MASSEY.

Appellate Court of Indiana, 1907. 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

HADLEY, J. This is a suit instituted by appellant against appellee for divorce. Appellant filed an amended complaint, to which appellee filed a demurrer, which demurrer was sustained. Appellant refusing to plead further, judgment was rendered against him. The ruling of the court on the demurrer is the only error assigned. The complaint, after stating the marriage and the residence of the parties, avers that they separated January 12, 1905; that during the time of their marriage appellee continuously charged appellant with being untrue to her and of being an unchaste man; that she stated to numerous good citizens of the community that he was untrue to her and unchaste, all of which she knew to be false; that she endeavored to destroy his business, and constantly upbraided him for using her money therein; that she was petulant, irritable, and constantly complaining; that she frequently asserted she cared nothing for him, for his home, or his business, and refused to take any interest in his home, when able to do so, and also, when able to do so, refused to prepare the daily meals for him and his servants; that she read frivolous literature, to the neglect of her household duties; that she, for a long time prior to and on the day of separation, was cold, abusive, scornful, and indifferent to the happiness of the appellant; that by reason thereof she kept appellant in continual distress, and the trouble destroyed his peace of mind and broke up his home.

If this complaint states facts sufficient to constitute grounds for a divorce, it must be under the fourth clause of section 1044, Burns 1901 (§ 1032, R. S. 1881), which is as follows: "Cruel and inhuman treatment of either party by the other." That there can be cruel and inhuman treatment without physical violence is now so well settled that citation of authorities is useless. What constitutes cruel and inhuman treatment must be determined by the facts of the given case. As was said in the case of Kelly v. Kelly (1883) 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732: "In considering extreme cruelty as a ground of divorce, courts have cautiously given it negative, rather than affirmative, definitions. The difficulty in giving it an affirmative definition arises from the fact that cruelty is a relative term; its existence frequently depends upon the character and refinement of the parties, and the conclusion to be reached in each case must depend upon its own particular facts. 'We do not divorce savages and barbarians because they are such to each other,' said the supreme court of Pennsylvania, in Richards v. Richards (1860) 37 Pa. 225. 'We can exercise no sound judgment in such cases (divorce cases) without studying the acts complained of in connection with the character of the parties, and for this we want the common sense of the jury rather than fixed legal rules.' Richards v. Richards, su-

pra." Mere cold neglect has been held by our Supreme Court to be cruel and inhuman treatment, in the case of Rice v. Rice (1855) 6 Ind. 100, wherein the court say: "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then, we think, that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief."

False charges of infidelity by a wife of a husband, widely circulated in the community, may cause the keenest suffering to the husband, in comparison to which blows would be insignificant. And, where, as averred here, these false statements are persistent, continuous, and are coupled with coldness, neglect, lack of interest in family affairs, aggressive action against his means of livelihood, irritability, petulancy and scorn, to the extent of breaking up his home, we can well perceive that they might produce the depths of distress and wretchedness that would naturally cause physical impairment. Kelly v. Kelly, supra; Holyoke v. Holyoke (1886) 78 Me. 404, 6 Atl. 827; Whitmore v. Whitmore (1882) 49 Mich. 417, 13 N. W. 800; Carpenter v. Carpenter (1883) 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; McGee v. McGee (1904) 72 Ark. 355, 80 S. W. 579; Spitzmesser v. Spitzmesser (1901) 26 Ind. App. 532, 60 N. E. 315. It is well settled that the false charge of adultery by a husband against his wife is grounds for divorce under the charge of cruel and inhuman treatment. Graft v. Graft (1881) 76 Ind. 136; Shores v. Shores (1864) 23 Ind. 546. And, in reason, a wife's like accusation against the husband should be no less available to him in his suit for her cruelty. 1 Bishop, Mar., Div. and Sep. § 1636; § 1044, Burns' 1901 (§ 1032, R. S. 1881). In a suit by the husband for divorce on account of cruel treatment, where no actual violence is averred, it must clearly appear from the facts in the case that the acts of the wife have rendered the continuance of the marital relation so intolerable to the husband as to endanger his physical well-being. The averments of the complaint show that such a condition would exist under the facts therein averred, with a man of ordinary temperament, standing and self-respect. Appellee relies upon the case of McAlister v. McAlister (1888) 71 Tex. 695, 10 S. W. 294. From the reasoning in this case, it will appear that the statutes of Texas and the decisions thereunder provide a different rule in cases of this character than that which obtains in this State, and we do not think it should be of controlling force. The court bases its decision upon the following statement:

"Wisely or not, our statutes do not make occasional acts of adultery on the part of the husband a cause of divorce when sought by the wife. Otherwise, when the husband asks divorce from the wife taken in adultery."

Cause reversed, with instructions to the lower court to overrule the demurrer to the amended complaint.[28]

MYERS, C. J., ROBY, P. J., and WATSON, J., concur. COMSTOCK and RABB, JJ., dissent. [The dissenting opinions of RABB and COMSTOCK, JJ., are omitted.]

HARMAN v. HARMAN.

Supreme Court of California, 1926. 198 Cal. 695, 247 P. 194.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action of divorce by Claude H. Harman against Jessie Harman, to which defendant filed a cross-complaint for separate maintenance. Judgment denying relief to either party, and plaintiff appeals. Reversed, with directions.

LAWLOR, J. This is an action for divorce prosecuted by Claude H. Harman, the husband, plaintiff and appellant, against Jessie Harman, the wife, defendant and respondent. The complaint is based upon several asserted acts of cruelty alleged to have been inflicted upon the appellant by the respondent. Respondent filed an answer and cross-complaint for separate maintenance wherein she sets forth three specifications of cruelty. The case went to trial upon the issues, and the trial court, among other things, found that the several allegations of the complaint charging cruelty were true, and that the several allegations of the cross-complaint charging cruelty were untrue. Judgment was entered, however, denying relief to either party, and awarding counsel fees and costs to the respondent.

The appellant asserts that "the only question for decision on this appeal is: After the trial court finds that plaintiff has established his right to a divorce, can the court arbitrarily deny him a decree?"

In support of a negative reply to this question the appellant cites, among other cases, Lewis v. Lewis, 167 Cal. 732, 733, 141 P. 367, 52

[28] Where one spouse, in a divorce action, in good faith charges the other with adultery, and fails to substantiate the charge, it is not cruelty, but, if the charge is made in bad faith, it is cruelty. See 18 L. R. A. [N. S.] 300, and 51 A. L. R. 1188.

In Farley v. Farley, 222 Mich. 459, 192 N. W. 599 (1923), it was held that the wife's procuring an indictment against the husband by falsely alleging that he had evaded the Selective Service Act (U. S. Comp. St. §§ 2044a–2044k) was extreme cruelty.

The husband's unsuccessful attempt, with bad motives, to have the wife committed to an insane asylum, was held to be "cruel and abusive treatment," in Michels v. Michels, 120 Me. 395, 115 A. 161, 18 A. L. R. 570 (1921).

L. R. A. (N. S.) 675. That case declares that—"The court is not authorized to deny a divorce where the evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint. Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 P. 853; Benkert v. Benkert, 32 Cal. 467. A case having been made out, there is no arbitrary power to grant or refuse the relief. But, in every action for divorce, the court is called upon to determine whether the evidence before it does establish the truth of the charge made in the complaint. As in other cases, every intendment is in favor of the finding made. * * *"

In the instant case, we have not before us a transcript of the testimony taken at the trial, but, every intendment being in favor of the findings made, the statement is not unwarranted that sufficient evidence, properly corroborated, must have been adduced by the appellant in support of the allegations in his complaint charging cruelty, for, as already indicated, the trial court found that these several allegations were true. This would necessarily satisfy the provisions of section 130, Civil Code. The allegations of the complaint being sustained by the findings, and keeping in view that the allegations of cruelty in respondent's cross-complaint were found to be untrue, it merely remains to determine whether the several alleged acts of cruelty charged in the complaint, if proved, would warrant the granting of an interlocutory decree to the appellant.

The complaint, in substance, sets forth that on many occasions the respondent told appellant that she did not love him, but lived with him because he was a good provider; that respondent has continually demanded complete control of the children, and has prevented appellant from disciplining them; that respondent frequently told appellant that his mother was "no good," and that his sister was a "whore"; that, while driving, respondent would continually issue orders and directions to appellant as to the operation of the automobile; that repeatedly respondent has told appellant "that his only idea of marriage is to have a female body at his disposal, and that he is lustful, meaning thereby that plaintiff was unreasonable in his demands of defendant for sexual intercourse"; that appellant is a locomotive engineer, and, upon his seeking to kiss respondent when he returned from trips, she would tell him "that it was his lust for sexual intercourse that prompted him to kiss, or seek to kiss, her; * * *" that respondent has often threatened to commit suicide, stating that appellant would, in such event, "be branded as her murderer"; that, though plaintiff gave his wages to respondent, she has continually complained of having nothing but "rags"; that respondent has called appellant "vile names, too opprobrious to be set out in this complaint"; that respondent on numerous occasions has told appellant's friends that he is "lustful, in that he was unreasonable in his demands upon her for sexual intercourse * * *"; that respondent has frequently informed appellant that she could have married men of wealth; that all of the several alleged acts have greatly dis-

turbed and injured appellant and interfered with his rest and sleep, making him unfit to bear his responsibilities as a locomotive engineer; and "that, by reason of the acts and conduct of defendant as hereinbefore alleged, she wrongfully inflicted upon plaintiff grievous bodily injury and grievous mental suffering."

In our opinion, these several allegations adequately state a cause of action for divorce, and, as already indicated, it must be assumed, in view of the findings that they were amply supported and proved by sufficient evidence, properly corroborated. Under these circumstances, the trial court is not authorized to deny a divorce. Lewis v. Lewis, supra.

The trial court is directed to enter an interlocutory decree of divorce on the ground of extreme cruelty in favor of the plaintiff and appellant. It is also directed to make such provision for the custody, support, and education of the two minor children of the parties, and for the division of the community property as it may deem just.

Judgment reversed with directions.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

NORTHRUP v. NORTHRUP.

Supreme Court of Michigan, 1918. 200 Mich. 623, 166 N. W. 919.

Appeal from Circuit Court, Wayne County, in Chancery; Walter H. North, Judge.

Suit by Leroy Northrup against Cora May Northrup for divorce. From the decree rendered, complainant appeals. Reversed, and decree for complainant.

Before OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ.

OSTRANDER, C. J. This cause was heard in April, 1916. At that time the plaintiff was 36 years of age. The parties were married in 1904, and lived together until 1914. In the ten years of cohabitation there had been three children born, but one of whom, the first born, a hopelessly deformed and physically deficient, but mentally bright, daughter, a great care, is living. The plaintiff charges his wife with extreme cruelty. Acts of physical violence are charged, and the testimony for plaintiff, particularly his own testimony, tends to prove that the defendant upon occasions employed her hands and feet upon him in inflicting personal injury, and her tongue in villifying and abasing him and his father. On the other hand, defendant, who denies the charges of cruelty, and who seeks no relief from the marriage contract, claims that she has been obliged to defend herself by force from threats and from attempts of plaintiff to strike her—to slap her. An analysis of the testimony shows that whatever either party did personally to the

other was as a rule the result of disagreements, the climax of wordy disputes. Both are reputable; the plaintiff a hard-working man, of good habits, home-loving, economical; the defendant a good housekeeper, clean and capable in a housewifely way. They had a good home, well furnished, convenient. Help, when it was needed, defendant always had. From a material standpoint, they should have prospered, as they did for a time, should have accumulated a competence, and in the course of time have been able to dismiss anxiety for the future. Their trouble, primarily, seems to be one of mismating; secondarily, the inability of one or both of them to compromise and to adjust differences—to adapt themselves to each other. As I have said, the physical encounters were usually, if not always, the conclusion, the result, of wordy wars. Plaintiff contends that defendant's conduct, "nagging, faultfinding, scolding, pestering the life out of me," as he puts it, with no prospect of ultimate peace, resulted finally in reducing him to a state in which he could not go on effectively with his business, lost his ambition, and seriously affected his health. He claims to have been fairly driven from his home by her, unable there to escape her petulent persecution, day or night. He left home once, in the night, going to a hotel to rest. He left home, finally, taking a journey of some length and a rest of some duration. Judgments were taken against him, and property he owned was sold to satisfy creditors, or those he claims were creditors. He is blamed for this by counsel for defendant. That he might have avoided this, might have gone on accumulating, paid his debts, saved his property, I have no doubt, if his courage and ambition had continued. Some excerpts from defendant's testimony throw light upon the situation. * * *[29]

The testimony of other witnesses, if true, shows her present attitude to be one of satisfaction so long as she is supported by her husband. That she visited her husband's place of business and there publicly entered upon wordy controversies with him is established.

Plaintiff testified that he never had slapped defendant, although he admits having threatened to do so. The weight of evidence is, I think, the other way, and requires the finding that he has in moments of exasperation slapped her face. That defendant feared him is not true. Her attack upon him while he was dressing upon the morning when he finally left home, when she took him by the ears and shook his head, is evidence of this.

The testimony tends to prove, and requires the finding, that defendant used in talking to her husband language not generally regarded as proper for either man or woman to use in speaking of plaintiff's father. * * *

The nature of a man's domestic troubles, or of a woman's domestic troubles, may be evidenced by its effects. Men like the plaintiff do not

[29] Long quotations from the evidence relating to the quarrels of the parties are omitted.

work hard for ten years or more to get and maintain a home and acquire a competence and then sacrifice home, family, and business as plaintiff has done for a whim or out of spite or revenge merely. There is a driving, compelling cause for such action. And when the cause is admittedly domestic trouble, the action is evidence of desperation, lost hope, insupportable conditions.

I should have been more sure of my conclusions if I had seen the parties, and other witnesses, as the trial judge did. Upon this record I am compelled to disagree with his conclusion, and to hold that plaintiff has made out a case of extreme cruelty practiced by defendant. It may be true, as the court below found, that the burden incident to caring for the child has done much to make defendant irritable. It does not excuse the conduct of defendant, who has, I believe, no affection for plaintiff and no purpose to assist in rebuilding and carrying on, if it were possible, a pleasant or peaceful home. It is not possible, I think, for them to live together.

The decree must be reversed, and one entered divorcing the parties. The custody of the child should be given the mother, presently at any rate. The record does not permit us to fix the alimony, if any ought to be allowed. The defendant is at liberty to apply to the court below for permanent and temporary alimony.[30]

30 "It is not necessary, in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are indeed often consistent with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own control, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated." Lord Stowell, in Holden v. Holden, 1 Hagg. Cons. 458 (1810). See, also, Robinson v. Robinson, 66 N. H. 600, 23 A. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632 (1891), where the court held that the professional practice of Christian Science by the wife, causing business loss to the husband and resulting in injury to his health, was extreme cruelty. But see the following cases, where it was held that the cruel treatment must be willful or intended to injure: Brown v. Brown, 129 Ga. 246, 58 S. E. 825 (1907); Ennis v. Ennis, 92 Iowa, 107, 60 N. W. 228 (1894); Freeborn v. Freeborn, 168 Mass. 50, 46 N. E. 428 (1897).

For a case of misconduct by one spouse not directed at the other, as cruelty, see Anon., 2 Ohio N. P. 342 (1897), but see contra, W—— v. W——, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491 (1886).

Harsh treatment by one spouse of the children of the other may be cruelty. See 18 A. L. R. 803.

For the husband to subject his wife to cruel treatment by his relatives may be cruelty. See 3 A. L. R. 993.

SAUNDERS v. SAUNDERS.

Court of Chancery of New Jersey, 1914. 82 N. J. Eq. 491, 89 A. 518.

Bill by Emma J. B. Saunders against Levin J. Saunders for divorce from bed and board for extreme cruelty. Dismissed without prejudice.

LEAMING, Vice Chancellor. I am convinced that the evidence in this case does not justify a decree of divorce. It is entirely clear that the married lives of these two parties have been extremely unhappy, but it is equally clear that the unhappiness has been the result of mutual fault; they appear to have formed the quarreling habit and persisted in its exercise with great tenacity. It is impossible to conclude that this was the fault of either to the exclusion of the other. The only physical violence upon the part of the husband was the occurrence which immediately preceded the separation of the parties. On that occasion the husband undoubtedly struck his wife with the satchel which he held in his hand; he had no right to do so, and deserved the most severe censure for the act. It is reasonably apparent that the act was provoked by the wife and occurred at the moment of impulsive anger on the part of the husband; but, while the anger may have been justified, the blow was not. That single act cannot, however, properly be made the basis of a decree under our statute. The remedy by decree of divorce for extreme cruelty is applicable not as a punitive, but as a preventive measure, to protect the health or life of the wife in the future from threatened danger; this has been repeatedly held.

The evidence in this case satisfies me that there neither has been nor will be real injury or danger to the life or health of petitioner from the past or probable future conduct of her husband. I am satisfied that he has deeply repented his loss of self-control on the occasion referred to, and that the future will afford the wife entire safety in his home, and also reasonable happiness there if she is disposed to contribute her efforts toward making that home a happy one. It takes two persons to quarrel, and I believe it to be within the power of either spouse to make a home happy.

It is entirely apparent that petitioner has at no time feared defendant; any infirmity of health which may have existed prior to their final quarrel was not due of petitioner's fear of defendant. Nor am I able to believe that defendant ever threatened to shoot petitioner. It is clear she never regarded the revolver incidents, if they in fact occurred, as a source of danger.

The concluding language of the opinion of Chancellor Runyon in Coles v. Coles, 32 N. J. Eq. 547, 557, may be here adopted as embodying my views in this case:

"The defendant's conduct, in laying violent hands on his wife, is not justified. It is not capable of justification. But the question to be determined is whether there is reason to apprehend that, if complainant shall return to his house, she will be in danger of violence or cruelty at

his hands. I do not think she will. But, if on her return, he shall again treat her with violence, this court will be open to her for relief. The bill will be dismissed, but without prejudice, as in English v. English, 27 N. J. Eq. 579."

I will advise a similar decree in this case.[31]

SABOT v. SABOT.

Supreme Court of Washington, 1917. 97 Wash. 395, 166 P. 624.

Department 1. Appeal from Superior Court, Klickitat County; William T. Darch, Judge.

Suit by Simon Sabot against Fannie S. Sabot. Decree for plaintiff, and defendant appeals. Affirmed.

CHADWICK, J. The only question in this case is whether the findings of fact are sufficient to sustain the decree. The court found:

"That for a period of two years last past the defendant has assumed and maintained towards plaintiff an indifferent attitude, and has made no attempt to conceal that she has neither affection nor regard for the plaintiff, and has by numerous annoying acts and words made the home life of plaintiff burdensome in the extreme, so that it has become impossible for the plaintiff to longer cohabitate and live with said defendant, all of which acts were without just cause or provocation."

"Cruel treatment of either party by the other, or personal indignities rendering life burdensome," are made grounds for divorce by the statute. Rem. Code, § 982.

Indifference is an "indignity," and unconcealed aversion is a "cruelty," within the meaning and intent of the statute. They are more refined, but no less substantial, than words, or blows, or neglect.

Affirmed.[32]

ELLIS, C. J., and MOUNT, MAIN, and MORRIS, JJ., concur.

[31] If, through lack of sensitiveness on the part of the other spouse, the conduct produces no serious effect, it is not ground for divorce. Sweet v. Sweet, 97 Conn. 693, 118 A. 36 (1922); Bennett v. Bennett, 24 Mich. 482 (1872).

Profane and obscene language on the part of the wife, in the husband's presence, may be cruelty. See Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654 (1907). But see Moir v. Moir, 182 Iowa, 370, 165 N. W. 1001 (1918), contra. Cf. Latham v. Latham (R. I.) 133 A. 241 (1926), involving vulgarity of speech and behavior.

Statutes expressly in some states, and by construction in other states, require that the cruelty endanger life. There are many cases involving this question of fact. See Hill v. Hill, 201 Iowa, 864, 208 N. W. 377 (1926), in which the court made a stricter application of this requirement than it had formerly done. See, also, 5 A. L. R. 712.

[32] There is a conflict of authority as to whether persistent refusal of sexual intercourse by one spouse is cruelty. That it is not, see Roush v. Roush, 90 W. Va. 491, 111 S. E. 334 (1922). That it is, see Nordlund v. Nordlund, 97 Wash. 475, 166 P. 795, L. R. A. 1918A, 59 (1917).

Communication of venereal disease by one spouse to the other may be cruelty. See 8 A. L. R. 1540.

(C) DESERTION [33]

JAMES v. JAMES.

Supreme Court of New Hampshire, 1878. 58 N. H. 266.

Libel, for divorce. Cause assigned, the willing absence of the husband from the wife for three years together, without making suitable provision for her support. The libellant, previous to her marriage, lived with her parents in this state. At the time of their separation, the parties lived in Canada. In July, 1871, the libellant procured money from her father and returned to this state, where she has since lived. She left the libellee because of his intemperate habits, and his failure to support her. He did not otherwise, ill-treat her. He had no property, but, when he would work, could earn $36 a week, and had work to do when he would do it. Libel dismissed, the libellant excepting.

SMITH, J. * * * The remaining question is, whether it has been shown that the libellee has willingly absented himself from his wife for three years together, without making suitable provision for her support.

There are decisions which hold that if a husband so abuses his wife as to render living with him personally unsafe for her, and for that reason she leaves him, she can maintain against him a suit for divorce, relying on such conduct as constituting desertion by him. 2 Dane Ab. 308; Reeve Dom. Rel. 207; Wood v. Wood, 27 N. C. 674; Almond v. Almond, 25 Va. 662, 15 Am. Dec. 781; Camp v. Camp, 18 Tex. 528. Such conduct seems, upon principle, to show the intent of the husband to desert, on the familiar rule that a person is intended to presume the natural and probable consequences of his acts; that there can be no distinction between his intending to oblige her to leave him, and intending himself to leave her. Bishop on Mar. and Div. 515. * * *

Pidge v. Pidge, 3 Metc. (Mass.) 257, was a libel for divorce a vinculo, alleging the willful and utter desertion of the libellant by the respondent. The evidence showed that the latter, without provocation, abused and beat the libellant, whereupon she left him, and never returned nor offered to return to him, and the respondent made no effort to cohabit with her, and made no provision for her support. It was held by a majority of the court, under a statute which enacted that a divorce a vinculo might be decreed in favor of either party

[33] Desertion was not a ground of divorce in the ecclesiastical courts in England, but restitution of conjugal rights would be decreed to a deserted spouse. Hardin v. Hardin, 17 Ala. 250, 52 Am. Dec. 170 (1850).

American statutes generally fix some definite period of time, usually one, two, or three years, as the period of desertion which will constitute a ground for divorce. In a few states, separation of the parties for a longer period of years, even though there be no desertion, is a ground for divorce. See 51 A. L. R. 763.

whom the other shall have willfully and utterly deserted for the term of five years consecutively without the consent of the party deserted, that the libel could not be maintained. The decision appears to have been put upon the ground that desertion, extreme cruelty, and gross neglect to provide suitable maintenance, were made the foundation by statute for divorce a mensa et thoro, and that it would be adding to the provisions of the statute to hold that the wife may treat the husband as the deserting party, when she is compelled by his misconduct to live apart from him. It does not appear that the question, whether the ill-conduct of the husband was intended to bring about a separation made necessary for the safety of the wife, was brought to the attention of the court. The statute was subsequently amended so as to include such cases.

The very able dissenting opinion, by Mr. Justice Putnam, affords conclusive reasons why, under a statute like ours, a different result should be reached. The learned judge said that, "to all legal and reasonable intendments, the wife, who is obliged to fly from her husband's violence and home into the street for her preservation, is to be considered to be there not of her own free will, but by reason of the force and violence of her husband. He has driven her from him, and it would be a perversion of terms to say that she, under those circumstances, deserted him."

The case finds that the libellant was compelled to separate from her husband because of his drunkenness, and of his neglect to furnish her and her child with the means of support. There was no other alternative for her except to remain and suffer, and perhaps starve. The law is not unreasonable, and does not require of the wife such sacrifice of her comfort or existence. The living with an habitual drunkard, in the wretchedness, suffering, and poverty resulting from such a life, may be more intolerable to a wife than occasional acts of cruelty. The natural and probable result of the libellee's drunken life and neglect to provide for the support of his wife was that which actually did take place. Having no home of her own, and no means of support, and the home he was bound to provide being no longer habitable, she returned to the home of her father. Judged by his acts and their natural result, the libellee intended to produce the separation of his wife from himself.

A wife abandoned by her husband in another state, who, though able, makes no provision for her support, may return to her parents here, and if subsequently the desertion continues for three years together, no provision for her support being made by him, she is entitled to a divorce. Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Kimball v. Kimball, 13 N. H. 222; Payson v. Payson, 34 N. H. 518. There is no distinction in principle between the desertion by the husband under such circumstances, and the compulsory separation caused by his ill-conduct. In the one case he abandons her to suffer and

starve by his voluntary desertion of her; in the other he leaves her to the same fate by his voluntary ill-treatment and neglect.

We think, upon the facts shown in this case, the libellant is entitled to treat the result of her husband's ill-conduct and neglect of herself as willing absence on his part. If at the trial term she can show that, during the period of absence alleged, the libellee had the ability to provide for her support, a divorce will be decreed; otherwise, the libel must be dismissed.

Case discharged.[34]

BINGHAM, J., did not sit.

LYSTER v. LYSTER.

Supreme Judicial Court of Massachusetts, 1873. 111 Mass. 327.

Libel for divorce from the bond of matrimony for desertion of the libelant by the libelee for a period of five years anterior to September 29, 1871, the date of the libel. The answer set up as a justification of the libelee in leaving the libelant his cruel and abusive treatment, and gross and confirmed habits of intoxication.

At the hearing before Colt, J., it appeared that the libelee left the libelant and lived separate from him for more than five years prior to the filing of his libel, without his consent; that, in 1865, the libelee brought a libel in this court against the libelant for a divorce from bed and board, in which she alleged that he had, since their marriage, contracted gross and confirmed habits of intoxication, and had for years past treated her with extreme cruelty; that there was a hearing of said libel upon the merits; and that the court dismissed the libel.

The libelee offered to show "cruel and abusive treatment of the libelant anterior to the time of filing her said libel, and gross habits of intoxication, with threats and abusive language on his part, which would so far justify her in living separate from him, or would so far put him in the wrong as to the whole matter as that he could not main-

[34] Where the cruelty of one spouse drives the other away, it is generally held to be desertion on the part of the one who caused the separation. Adulterous intercourse by one spouse in the home, causing the other to leave, is similarly regarded. But mere failure to support, unless coupled with other circumstances, has been generally held not to be desertion. See 29 L. R. A. (N. S.) 614.

In the following cases the husband was held guilty of desertion, having left his wife, though he continued to furnish money for her support: Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717 (1898); Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579 (1870); Power v. Power, 66 N. J. Eq. 320, 58 A. 192, 105 Am. St. Rep. 653 (1904). Contra: In re Ralston's Appeal, 93 Pa. 133 (1880), semble.

By the weight of authority, the refusal of sexual intercourse is not desertion and does not justify desertion by the other spouse. There are also decisions to the contrary. Statutes in some states govern this question. See notes in 25 Col. L. Rev. 105, and 23 Col. L. Rev. 78.

tain this libel." But the judge ruled "that the decree of the court in the former case was conclusive as to the allegation of cruel and abusive treatment by the present libelant towards the present libelee and of his habits of intoxication; and that no degree of cruelty or abusive treatment in speech or behavior on his part, or habits of intoxication, would justify her in leaving him, or bar his right to a divorce for her desertion, short of such extreme cruelty or gross and confirmed habits of intoxication as would have entitled her to a divorce from bed and board;" and he excluded all evidence of cruelty and intoxication prior to the date of her said libel, and granted a divorce as prayed for. The libelee alleged exceptions.

GRAY, J. The decree upon the former libel of the wife was doubtless conclusive, at the hearing of the present libel of the husband, upon any question necessarily involved in the former adjudication. Fera v. Fera, 98 Mass. 155; Thurston v. Thurston, 99 Mass. 39; Lewis v. Lewis, 106 Mass. 309; Slade v. Slade, 58 Me. 157. But, in order justly to estimate the effect of that judgment, it is necessary to consider what was then brought in issue between the parties.

By the Gen. Sts. c. 107, § 9, a divorce from bed and board might be decreed for extreme cruelty, gross and confirmed habits of intoxication contracted after marriage, or cruel and abusive treatment. Any acts or conduct which injured or endangered life, limb or health, or created reasonable apprehension of such injury or danger from a continuance of the cohabitation, would constitute cruel and abusive treatment within the meaning of the statute. Bailey v. Bailey, 97 Mass. 373; Evans v. Evans, 1 Hagg. Cons. 35, 39, 40; Milford v. Milford, L. R. 1 P. & D. 715; S. C. in House of Lords, 37 Law J. (N. S.) P. & M. 77. But, in order to amount to extreme cruelty, there must also be proof of personal violence intentionally inflicted. Ford v. Ford, 104 Mass. 198; Warren v. Warren, 3 Mass. 321. And, to make out a cause of divorce upon the ground of habits of intoxication, such habits must not only have been gross and confirmed, but they must have been contracted since the marriage; if they were contracted before the marriage, although not known to the other party until afterwards, they would not be a cause of divorce.

In suits for restitution of conjugal rights, the English courts have generally acted upon the rule that nothing is a defense which would not entitle the defendant to a judicial separation. Burroughs v. Burroughs, 2 Sw. & Tr. 303, and cases there cited. And that rule has been adopted in Pennsylvania as applicable to suits for divorce. Grove's Appeal, 37 Pa. 443. But the two classes of cases have not been deemed in England to be governed by the same rule. Simmons' Divorce, 12 Cl. & F. 339; Haswell v. Haswell, 1 Sw. & Tr. 502; Yeatman v. Yeatman, L. R. 1 P. & D. 489, and L. R. 2 P. & D. 187; Rowley v. Rowley, L. R. 1 H. L. Sc. 63. And the very nature of the two shows that they should not be.

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Upon the husband's suit for restitution of conjugal rights, a decree in his favor directs the wife to return to him, and directs him to receive her and treat her with conjugal kindness. But, if he sues for and obtains a divorce, the decree either wholly severs the bond of matrimony, or at least separates the wife from the bed and board of the husband. In the one case, the husband stands in the position of undertaking to abide by the marriage contract and seeking to have it enforced; in the other, he invokes the assistance of the court to dissolve or impair its obligation. The general principle which governs both is, that the court will not give judicial effect to a separation between the parties, except upon full proof of a cause which the law declares to be sufficient for a divorce. A just application of this principle requires that misconduct of the husband, not amounting to a cause of divorce, and which affords no reason why, upon his undertaking to conduct himself properly for the future, the marital relation should not be fully re-established by judicial decree, may yet, when he makes no offer to amend his course, but seeks for a judicial separation for his wife's breach of duty, well be considered as qualifying her offense and his right to rely upon it as a cause for dissolving the marriage relation, in whole or in part.

It has accordingly been declared by a great weight of American authority that ill treatment or misconduct of the husband, of such a degree or under such circumstances as not to amount to cruelty for which the wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so. Dewey, J., in Pidge v. Pidge, 3 Metc. (Mass.) 257, 261; Shaw, C. J., in Burlen v. Shannon, 3 Gray (Mass.) 387, 391; Chapman, J., in Bailey v. Bailey, 97 Mass. 373, 379; Walworth, C., in People v. Mercein, 8 Paige (N. Y.) 47, 68; Zabriskie, C., in Laing v. Laing, 21 N. J. Eq. 248, 250. Poor v. Poor, 8 N. H. 307, et e contra, cited 13 N. H. 224; Gillinwaters v. Gillinwaters, 28 Mo. 60. Hardin v. Hardin, 17 Ala. 250, 52 Am. Dec. 170.

Applying to this case the principles thus established, the result is that cruel and abusive treatment, which injured or endangered or created a reasonable apprehension of injury or danger to life, limb or health, but did not amount to extreme cruelty, for want of proof of acts of personal violence, would not have been admissible under the allegations in the former libel. Ford v. Ford, 104 Mass. 198. But such treatment would have been a sufficient cause of divorce, if duly pleaded; and even a less degree of ill treatment than would have entitled the wife to a divorce might have excused her in leaving the husband. And in like manner habits of intoxication, so gross and confirmed as to render a continuance of cohabitation intolerable, might justify the wife in separating herself from the husband, although for want of proof that such habits had been contracted since marriage, or of cruel treatment, they would not amount to one of the statute causes of divorce. The only causes of divorce alleged in the former libel having been extreme

cruelty, and gross and confirmed habits of intoxication contracted since marriage neither the question whether the husband had been guilty of cruel and abusive treatment, short of extreme cruelty, towards the wife, nor the question whether he had habits of intoxication, however gross or confirmed, contracted before marriage, was in issue in that case, or could have been determined by the decree therein.

It follows that the justice who presided at the trial erred in excluding all evidence of cruelty and intoxication prior to the date of the former libel; and in ruling that no degree of cruelty or abusive treatment in speech or behavior on the part of the husband, or habits of intoxication, which would not have entitled the wife to a divorce from bed and board, would justify her in leaving her husband.

Exceptions sustained.

ARNABOLDI v. ARNABOLDI.

Court of Chancery of New Jersey, 1927. 138 A. 116.

Suit for divorce by Joseph P. Arnaboldi against Gladys E. Arnaboldi, wherein defendant filed counterclaim. Petition and counterclaim dismissed.

BENTLEY, Vice Chancellor. This proceeding is based on a petition filed by a husband, charging adultery, and a counterclaim alleging desertion.

The parties were married in 1919. They have three young children, and the early days that they spent with each other appear to have marked them as leading ordinary lives. The petitioner seduced the defendant before marriage.

On August 27, 1923, the petitioner left the defendant and their children and has never returned. They differ widely as to the cause of his departure. He says she was leading a life that no husband should be expected to tolerate. That she not only neglected nearly all of her household duties, making it necessary for him to do much of it, including even laundering of some of the apparel for his children and constantly cooking his own meals, but, in addition to that, he says that his principal concern was over the frequent, if not habitual absences of the defendant from the home until late at night. In the month of May she willfully and against his determined efforts departed from her home for the day with a man unknown to her husband, giving as her excuse that he was a salesman who was going to assist her in the selection and purchase of an overcoat for herself, notwithstanding the fact that the trip was made on a Sunday. The defendant does not seriously contradict this testimony, but she alleges that the reason her husband left her was his objection to any more children. She says that at the time of his departure, or the night before, she told him that she thought she was again pregnant, and that he, thereupon, went away.

As between these two stories, it seems to me that the probabilities are

all in favor of the petitioner. My reasons for so believing would be tolerable to publish in this opinion, and they have been completely indicated to the parties and their counsel. After the petitioner had left his home the defendant fell in with a man named Lehey, with whom she unquestionably committed adultery, although she denies it. My reasons for so deciding have also been sufficiently indicated to counsel and it would serve no good purpose to reproduce them here. Thus, we have a situation in which it is shown that a man who was dissatisfied with his wife's conduct left her, although that conduct did not amount to a matrimonial wrong recognized by our divorce statute as a ground for divorce. There is no proof of any adultery before the separation, and no extreme cruelty or desertion by the wife.

The first point made against any decree in favor of the petitioner is that he himself was guilty of desertion when he left his wife, who had not been guilty at that time of any matrimonial offense recognized by our Legislature. I am not aware of any adjudication by the Court of Errors and Appeals that definitely decides or lays down any rule as to the sort of conduct on the part of one spouse that will justify the other in withdrawing from cohabitation. There can be no question that the great weight of authority is expressed in 1 Bishop's Mar., Div., and Sep. § 1742, where it is said:

"Where there is no consent, acquiescence, or estoppel, * * * no ills arising out of the marriage, or ill conduct of one party to the other, will so justify a breaking off of the cohabitation as to prevent its being desertion, except ill conduct of the sort and degree which the law has made foundation for divorce."

This learned and most careful author says that after more than 40 years spent in uninterrupted reading of judicial decisions and interpreting them, the dicta of judges constitute such a mass of contradictions that any author by skillful selection could write any sort of a doctrine on any subject by repeating the words of the selected dicta, "and all the fools would praise his book for its marvelous accuracy." He says that, with all the volumes that have been written, he cannot say there is one case in which it is authoritatively laid down that the above rule is not the true one. Sections 1747, 1748. In this court, in the case of Moores v. Moores, 16 N. J. Eq. 275, Chancellor Green, in passing upon a defense of justification in a suit for desertion, said:

"The conduct which will justify the wife in abandoning her husband must be such as would constitute a ground for divorce or alimony" (citing authorities).

In the later case of Laing v. Laing, 21 N. J. Eq. 248, Chancellor Zabriskie laid down the opposite rule saying that conduct less atrocious than was requisite to sustain a suit for divorce might excuse the offended spouse leaving the wrongdoer; but a careful reading of his opinion will show that he actually decided the case as he did because the wife had condoned the offenses of which she complained, and they had never been repeated. Consequently, what he had to say on the subject

under discussion amounted, in fact, to no more than an expression of his individual opinion, and not a decision of the case. Anything said in that opinion at variance with the views expressed in Moores v. Moores, supra, does not in any way shake the authority of the latter case. In Boyce v. Boyce, 23 N. J. Eq. 337, Chancellor Zabriskie seemed to reconsider his dictum in the Laing Case, because he there found and decided that the most provocative kind of conduct on the part of a wife, but not amounting to a matrimonial offense, invested the husband with no right to separate himself from her. In Meldowney v. Meldowney, 27 N. J. Eq. 328, Vice Chancellor Van Fleet said that by personal violence, coarse language, and constant neglect, not amounting to extreme cruelty, the petitioner had driven the defendant away from him quite as effectually as if he had bodily put her out of the house, but he actually rendered his decision on the ground that there was no obstinacy in the separation. Furthermore, there is not a scintilla of proof shown in the opinion from which the extent and character of the misconduct of the petitioner in that case may be inferred. It is merely said that a daughter testified: "Mother left because she could not stand it any longer."

Of course, that great judge never considered the daughter's opinion to be evidence. In Drayton v. Drayton, 54 N. J. Eq. 298, 38 A. 25, Chancellor McGill said:

"The generally accepted, and, I think, the true, doctrine is that continued desertion, as contemplated by such a statute as ours, is justified only when it is shown by clear and satisfactory proof that the deserting party has been so offended against as to authorize at his instance, a decree for divorce or judicial separation" (citing many decisions in this and other jurisdictions, including some of those already cited herein).

The present Chancellor, in Suydam v. Suydam, 79 N. J. Eq. 144, 80 A. 1057, declared the law to be the same way, at page 145 (80 A. 1057), as he also did in Csanyi v. Csanyi, 93 N. J. Eq. 11, 115 A. 76, and Danielly v. Danielly, 93 N. J. Eq. 556, 118 A. 335, as well as in Hauenstein v. Hauenstein, 95 N. J. Eq. 34, 122 A. 241.

In the case of Doty v. Doty, 92 N. J. Eq. 660, 114 A. 546, while the rule was not discussed, it would appear to be some support to the rule adopted in this court. There, a woman left her husband because of conduct upon his part which caused "her to be afflicted with a serious nervous trouble, and threatened to permanently destroy her health and comfort if she continued to live with her husband." This, of course, fits the rule, defining extreme cruelty, in Black v. Black, 30 N. J. Eq. 215, at page 221, quoted and adopted by the Court of Errors and Appeals in the Doty Case. In fact, that court say, in the last-named case:

"We think the petitioner established a clear case of constructive desertion and therefore she was entitled to the relief prayed for in her petition."

While it does not follow necessarily that less provocation would not have excused her departure from her husband, yet there would seem to

be some logic in the belief that the Court of Errors and Appeals had in mind the rule under discussion. In Young v. Young, 94 N. J. Eq. 155, 119 A. 92, 25 A. L. R. 1049, the petitioner said he left his wife because they had a quarrel over the fact that he was made ill "from eating meat which she cooked." The present Chief Justice, writing the opinion for the Court of Errors and Appeals, said that he had deserted his wife without justifiable cause, "for it never has been suggested, so far as I know, that dissatisfaction upon the part of the husband with his wife's cooking justifies him in permanently deserting her, even if on one occasion he is made ill from eating food she has prepared." From this language, it is apparent that there must be some standard by which the propriety of the departing spouse must be measured.

And, in reason, what other standard could be adopted? As Bishop says, in his work quoted above, if this is not the rule, what rule shall be adopted? How much less misconduct will excuse the departure? Is there to be no rule? Is each case to be decided upon the personal opinion of the judge or one of the parties (section 1750)? It would seem to me that the Legislature has fixed the rule when it formulated the causes for any one or more of which one spouse may leave the other and secure a decree of divorce. It is almost banal to say that the policy of the state is in the keeping of the legislative branch of the government, and that the commonwealth has a deep and vital interest in the preservation of the home, which is founded upon matrimony, whence it necessarily follows that promiscuous and unwise dissolution of marriages would be deeply injurious to the public. The law requires that parties, who are married, shall remain married, until freed by judicial pronouncement, and, until free, shall live together until one or the other of such parties shall have committed one or more of the defined offenses. It is not every grievance that one may have against the other, either temporary or permanent, that shall be allowed to destroy this solemn compact. Whether petty or weighty, there is no middle ground. The state has said that if either of the parties be guilty of extreme cruelty, adultery, or desertion the other may, upon meeting certain safeguards, secure a divorce, either absolute or limited. For less than this, no such decree shall be made, and it therefore follows that no separation shall occur. Having taken each other for better or worse, anything less than the state has declared to be a ground for divorce must be borne or overcome.[35]

[35] Accord: Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156 (1891); Crounse v. Crounse, 108 Va. 108, 60 S. E. 627 (1908).

See Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758 (1911), and Hamilton v. Hamilton, 87 W. Va. 534, 105 S. E. 771 (1921), holding that, though the conduct of one spouse, not a ground for divorce, was not constructive desertion, though it caused the other to leave, yet it gave no ground for divorce for desertion against the one who left; the court applying the "clean hands" doctrine.

The husband's breach of his promise to buy his wife a home, an automobile, etc., is of course, no justification for her desertion. McManus v. McManus, 191 N. C. 740, 133 S. E. 9 (1926).

I regret that I cannot bring myself to a belief that the defendant was by all means averse to the absence of the petitioner, as that would render his conduct lacking in obstinacy, and therefore, because of the rule already dealt with at length, he would not be, before the court, himself guilty of conduct with relation to the marriage that renders his position untenable. I mention this because counsel joined in importuning the court to end the impossible position of these parties by severing the matrimonial bond. Personally, I believe that it would be much better for everybody concerned if they could be freed from one another, but the policy of the state has been established, and counsel must realize that it is vain to expect the court to be swayed by compassion in the face of the clearly expressed legislative will. If such were to be done, the administration of the divorce law would result in the greatest chaos, each case depending upon the personal view and inclination of the particular member of the court by whom it should be heard.

Nor can the defendant expect to succeed in securing a divorce by reason of anything decided in Hedden v. Hedden, 21 N. J. Eq. 61. There, it was said that if a man seduced his wife before their marriage and was thus put upon his guard as to her weakness, he is called upon to use "peculiar vigilance" to protect her against her weakness. While it is true that the petitioner seduced his wife before marriage, it is quite as true that he did everything he could to prevent her falling again into evil ways. He urged her in every way he could to remain at home evenings, and even went to the extent of a personal struggle to prevent her going to New York on the Sunday she says she went with a strange man to select an overcoat. My own recent opinion in Pike v. Pike, 136 A. 421 (not yet officially reported), has been cited by the defendant. In that case, the husband, after seducing his wife, never made a home for her, gave her little or none of his society, permitted her to reside in a hotel in New York City while he remained domiciled with his parents in New Jersey, allowed her to live under her maiden name and to pursue the vocations of model and actress, which are perilous to the chastity of any woman. This is a very different situation from that of a man who gives his wife his name, prepares a home for her, and is ready and willing to live upon ordinary domestic terms. But even if he had not lived up to the rule of Hedden v. Hedden, supra, it would be of no avail to her, because that is a defensive doctrine that, it seems to me, can never be used for the purpose of securing a divorce, because in proving it the woman, of necessity, stamps herself as an adultress whose hands are so unclean that she cannot thereby secure affirmative relief. I know of no case where either a man or woman can plead his or her own adultery as a ground for securing a divorce against the other spouse.

Counsel for the petitioner apprehends that the case of Young v. Young, supra, has been overruled by the decision in the later case of Smith v. Smith, 95 N. J. Eq. 657, 123 A. 738, and, hence, that the petitioner was not a deserter and was under no duty to seek out his wife and solicit her return. With the former of these deductions, I am

unable to agree. In the last-named case the defendant actually deserted her husband without any provocation or cause on his part, and went to live with another man. The rationale of the opinion is that, as one of the exceptions to the rule requiring a husband to attempt to effect a reconciliation with his deserting wife, where her departure was caused to any extent by his misconduct, even though not amounting to a matrimonial offense, if a woman is guilty of conduct that gives her husband just cause to suspect her chastity, he is under no obligation to attempt to effectuate her return. This is very different from the problem presented by the case at bar, because here the husband himself was the deserter before any immoral conduct on the part of the defendant cognizable in a divorce suit. In short, Smith v. Smith sets up an exception to the duty to effect a reconciliation, while the question, to decide which that case is cited, is whether or not misconduct less than that which will support a decree of divorce will justify a withdrawal from matrimonial cohabitation.

Both the petition and the counterclaim should be dismissed.

DE BLOIS v. DE BLOIS.

Superior Court of Delaware, 1927. 138 A. 640.

Petition for divorce by Lewis Amory De Blois against Jeannette Howard Weldin De Blois. Decree nisi refused.

PENNEWILL, C. J., and RODNEY, J., sitting.

The petitioner contended that, while she left the respondent, the separation was by mutual consent, and that he subsequently wrote the respondent and tried to bring about a reconciliation, but that she refused to be reconciled to him. The respondent denied that she consented to any permanent separation and claimed that she had no thought that her husband intended to leave her except temporarily.

PENNEWILL, C. J., delivering the opinion of the court, among other things, said:

Even if the separation between the petitioner and the respondent was by mutual consent we think the divorce should not be granted because we are not convinced that the invitation or request for the wife to return, extended to her by letter from her husband, was a real, honest and bona fide invitation. It was a typewritten request couched in very brief and formal language. To that letter the wife made reply.

The invitation to a wife to return to her husband's bed and board in a case like this ought to be sincere and based on love and affection. It certainly ought to be something more than a purpose to put the wife in a position of being guilty of implied or technical desertion and thereby giving the husband a ground or cause for divorce. A consideration of all the circumstances of this case lead the Court to believe that such was the motive, and the only motive that inspired the letter of invitation.

It is most reasonable to believe that if the husband really wished his wife to return to him he would have gone to see her and talked to her as a reconciled husband would naturally have talked and personally have requested her return. At least he would not have sent her a cold and formal letter couched in the briefest terms.

A decree nisi is therefore refused.

BOHMERT v. BOHMERT.

Court of Appeals of New York, 1926. 241 N. Y. 446, 150 N. E. 511.

Action for separation by Anna Bohmert against William R. Bohmert. From a judgment of the Appellate Division (210 N. Y. S. 1, 213 App. Div. 103), reversing on the law and facts a judgment of dismissal, and directing judgment for defendant on his counterclaim, plaintiff appeals. Affirmed.

POUND, J. This is an action for a separation. The parties hereto had had numerous unhappy differences and dissensions which culminated in an altercation over a woman who had been brought by the wife into their home as an investigator or detective under the false pretense that she was a friend of the wife whom the husband had previously met. The husband ordered the woman out of the house on the day she arrived. Obviously she had been brought in to be a witness for the wife. Plaintiff, in a rage, left with her. This was on June 18, 1923. On June 21st, three days thereafter, she commenced this action. The complaint alleges numerous acts of alleged cruel and inhuman treatment. The answer denies the material allegations of the complaint, and alleges that plaintiff abandoned defendant on June 18th. The reply denies the abandonment, and justifies the departure of the wife as being due to the conduct of the husband.

On June 29th a motion for temporary alimony was heard. Defendant in his affidavit in opposition stated that "his home is now ready for her," and, therefore, asked that the motion be denied. The motion was denied. On March 28, 1924, plaintiff made a motion for leave to discontinue the action, which was denied.

When the case came on for trial on April 24, 1924, the trial court dismissed the complaint for failure of plaintiff to present any proof in support of its allegations. The plaintiff made no attempt to establish her cause of action. The findings are to the effect that plaintiff left the house temporarily, with the intention of returning thereto; that defendant's offer on the motion for alimony to take her back was made in bad faith, to defeat the motion; that on February 26, 1924, eight months after bringing suit, she offered to return to his home, but the offer was rejected on the ground that she had made an irrevocable election by commencing this action (this offer was, however, in the form of a formal demand on the husband made by the wife's attorneys); that

the offer to return was renewed by plaintiff's attorneys both at the opening of the trial and at the conclusion of defendant's case and at the conclusion of the entire case, but was refused; that by so refusing defendant had deserted plaintiff. The counterclaim of the defendant for a separation on the ground of desertion was dismissed. Both complaint and counterclaim having been dismissed, no legal separation was decreed.

From the judgment entered on this decision defendant appealed. The Appellate Division struck out the foregoing findings, and made new findings. It found that the defendant's offer on the motion for alimony to take plaintiff back was made in good faith, and that plaintiff refused to accept it; that plaintiff left defendant on June 18th, but it made no finding as to her intention to return at that time. It omitted all findings as to plaintiff's offers to return, except to find that for nearly eight months, and until February, 1924, plaintiff made no offer to return to defendant. It properly struck out the finding that defendant deserted plaintiff by reason of his refusal to receive her back on her offer to return as not within the issues. In the opinion it is said that the Special Term erred in receiving evidence of plaintiff's belated offers to return home made long after the action was brought. A decree of separation against plaintiff for her abandonment of defendant on June 18, 1923, was granted.

The decision thus made appears to rest on the proposition of law that, when a wife leaves her husband without legal justification, and begins an action of separation against him for cruel and inhuman treatment, her election to return to him must be promptly made, or evidence thereof will not be relevant on her defense to his counterclaim of abandonment. In making its findings, however, the Appellate Division has proceeded as if this evidence, although in the case, was of no probative force. The rule of law in the opinion is too broadly stated. Evidence of offers to return is properly received in a separation action for abandonment as bearing on the question of abandonment or temporary absence and the question of the right to return after an abandonment.

Although the rule has been generalized as holding that desertion "contemplates a voluntary separation of one party from the other without justification, with the intention of not returning" (Williams v. Williams, 29 N. E. 98, 130 N. Y. 193, 197, 14 L. R. A. 220, 27 Am. St. Rep. 517), it has not been held that the mere departure of one spouse from the other with the present intention of not returning is in and of itself a finality which entitles the other party to a decree.

The right of the wife to return after leaving her husband was recently considered in Silberstein v. Silberstein, 113 N. E. 495, 218 N. Y. 525. Following the reasoning in that case, the first question to be considered is whether, as between mere temporary absence and intent to abandon, the evidence sustained a conclusion of abandonment. If the wife's absence is a temporary one, which has not ripened into an

abandonment at the time she offers to return, it is the husband's duty to take her back. Departure from the home, followed by the commencement of an action on charges afterwards withdrawn, may be evidence bearing on a wife's intention to abandon her husband, but it is not conclusive on the rights of the parties. It is her privilege to change her mind, drop her charges, and ask her husband to receive her. Her conduct amounts to abandonment only if it is persistent and obstinate. But for eight months after plaintiff left her husband she made no offer to return, although her husband had offered on the alimony motion to receive her. The Appellate Division was justified in finding an abandonment on June 18, 1923.

The question then arises as to the duty of the husband when the wife has actually abandoned him, and thereafter offers to return, as plaintiff offered to do on the trial in April, 1924. The court said in the Silberstein Case: "What his [the husband's] duty was if there had been an abandonment, we do not now decide," nor need we now attempt to formulate a general definition of duty applicable to all cases. The rule seems well established that offers to return, made after the prescribed period, i. e., after the cause of action for abandonment has accrued, are of no avail, where the husband has in good faith indicated his willingness that the wife should live with him and she has unreasonably refused. When the wife leaves the husband, and without justification brings an action against him for separation, the husband's marital duty to her is reduced towards a minimum. A formal offer of reconciliation in the course of the action may be enough. Both parties are permitted to preserve their self respect. If the husband has not a "right to require his wife, even when she is in the wrong, to crawl back to him" (Newing v. Newing, 18 A. 166, 45 N. J. Eq. 498), neither is it his duty to pay amorous court to a rebellious and unrepentant wife to induce her to return (Cargill v. Cargill, 1 Sw. & Tr. 235; Hall v. Hall, 46 A. 866, 60 N. J. Eq. 469; Id., 55 A. 300, 65 N. J. Eq. 709).

Civil Practice Act, § 1161, prescribes no period of absence as a prerequisite to an action for abandonment. The offer or consent to return after a departure with the intention of not returning, to be effective, must, therefore, be made in good faith within a reasonable time after departure, or at least after the husband's offer to receive the wife. What is reasonable will depend on the circumstances of the case and the conduct of the parties. If a wife leaves her husband on the impulse of the moment, animated by a sense of continued wrong and injustice, culminating in an episode of anger, and under that impulse begins an action for separation, intending to cease all relations with the husband, and, if the husband's offer to take her back comes too soon after her departure then to be considered calmly, a time for repentance and reconciliation may still remain. When a litigation is pending, it might be a fair inference that eight months is more than a reasonable cooling time, and that the wife must then be deemed to have made an irrevocable choice to lie in her own bed. Furthermore,

she may not trifle with the court. Evidence of her offers to return, not spontaneous or conciliatory in their character, but made under the advice of counsel as a part of the strategy of a lawsuit, if not irrelevant as matter of law, would be entitled to little weight as evidence of an honest desire to live with her husband. Legal formulas are not always to be accepted as the equivalent of a wifely disposition.

That a belated but genuine offer to return after an act of abandonment, even when followed by an action for separation on the ground of cruelty, cannot be shown as bearing on the good faith of both parties or on the actual intent of the wife in leaving the husband and the willingness of the husband to receive her after her departure, does not follow. The question is whether, within a reasonable time after the separation, she wanted to live with him, and he willfully refused his consent. The facts and circumstances are always competent evidence on the question. Stubborn pride may continue for a long time before it bows its head. A wife who leaves her husband, sues him for separation, and fails to establish her cause of action, has not abandoned him as matter of law because the case does not come to trial for a year. Nor has he abandoned her when she herself disregards the marriage contract. Civil Practice Act, § 1163; Hawkins v. Hawkins, 86 N. E. 468, 469, 193 N. Y. 409, 412, 19 L. R. A. (N. S.) 468, 127 Am. St. Rep. 979, 15 Ann. Cas. 371. The parties are left as they were when neither establishes the right to a decree of separation.

The Appellate Division on the facts found on the evidence reached a correct conclusion in refusing to give weight to the plaintiff's offer to return, made long after a departure from the home which she did not attempt to justify. The ends of justice would not be served if she could so extricate herself from a situation created by her own misconduct. * * *

The judgment should be affirmed, without costs.[36]

HISCOCK, C. J., and CARDOZO, MCLAUGHLIN, CRANE, ANDREWS, and LEHMAN, JJ., concur.

Judgment affirmed.

[36] Compare Mirizio v. Mirizio, 248 N. Y. 175, 161 N. E. 461 (1928).

Where the statute fixes a definite period of desertion and that period has expired, an offer of reconciliation by the deserting spouse comes too late. See 18 A. L. R. 630.

Where absence is consented to, it is not desertion. Melson v. Melson, 151 Md. 196, 134 A. 136 (1926). See 119 Am. St. Rep. 620 and 138 Am. St. Rep. 152. But the consent may be revoked, and absence thereafter is desertion. Croll v. Croll, 60 Pa. Super. Ct. 415 (1915).

The period of the pendency of a prior divorce suit, even though such suit was brought by the party now defending, if brought in good faith, cannot be counted as desertion. Vickers v. Vickers, 95 W. Va. 323, 122 S. E. 279, 41 A. L. R. 266 (1924).

DANFORTH v. DANFORTH.

Supreme Judicial Court of Maine, 1895. 88 Me. 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. Rep. 380.

WALTON, J.[37] The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. Stewart v. Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In Kennedy v. Kennedy, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted. R. S. c. 60, § 2. And we think that if a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and can not be defeated by proof that on one occasion within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion will be interrupted, or regarded as condoned, and can not be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete,—that the mere fact that on one occasion he

[37] Statement of facts omitted.

visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.[38]

FRANKLIN v. FRANKLIN.

Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851.

Libel by one Franklin against one Franklin for divorce. The trial court ruled that libelee was not guilty of desertion, and reported the case to the Supreme Judicial Court. Decree for libelant.

KNOWLTON, C. J. The libelant and his wife are natives of England, where they were married in 1874, and where several children were born to them. The libelant, being a skillful mechanic, came to America "to better his condition in life" in 1891, and he has remained here ever since. His wife refused to accompany him, and he has not seen her since their separation. Some of their children have joined him here. He testified that on two occasions after his arrival in America he sent her sums of money sufficient to defray the expense of bringing her and the children who were then with her to America in a comfortable and respectable manner. Once she kept the money, but refused to come, and on the other occasion she refused to come, and returned a portion of the money. There is an averment in the libel that the libelant has continuously resided in this commonwealth for the last five years, and we infer from the report that there is no question on this part of the case. On these facts the libelant asked for a decree of divorce nisi for desertion; but the judge declined to order a decree, and ruled that the libelee, in thus refusing to follow her husband to this country, was not guilty of desertion, and reported the case to this court. If the ruling was wrong and the evidence warrants it, a decree nisi for a desertion is to be entered.

If the libelee was guilty of desertion, there is no question as to the jurisdiction of the court. Jurisdiction depends upon the situs of the libelant, and not upon the place of the marriage, or of the commission of the offense against the marital relation. Under our statute, "if the libelant has lived in the commonwealth for five years last preceding the filing of the libel, * * * a divorce may be decreed for any cause allowed by law, whether it occurred in this commonwealth or else-

[38] Contra: Burk v. Burk, 21 W. Va. 445 (1883), where the cohabitation was more extensive.

If the deserting spouse returns, and is received, the period of desertion is interrupted. Ex parte Aldridge, 1 Swab. & T. 88 (1858); Woolfolk v. Woolfolk, 96 Ky. 657, 29 S. W. 742 (1895).

The usual requirement is that the period of desertion must be continuous, and therefore it cannot be made up by adding periods before and after an interruption. See 39 L. R. A. (N. S.) 1133.

where, unless it appears that the libelant has removed into this commonwealth for the purpose of obtaining a divorce." Rev. Laws, c. 152, § 5. If, therefore, the evidence warrants a finding of utter desertion by the libelee, whether it occurred in England or in America, and if it continued for three consecutive years next prior to the filing of the libel, a divorce should be granted. Rev. Laws, c. 152, § 1.

The fundamental fact to be considered is that the husband, as head of the family, legally responsible for its support, has a right to choose and establish a domicile for himself and his wife and children. A refusal of the wife to stay with him in that domicile, without a sufficient reason for her refusal, is desertion. This right of the husband is not limited to the state or country in which the parties live at the time of their marriage, but in these days of easy communication between different countries, and different parts of the same country, he may exercise it reasonably, in a way which will change his citizenship and allegiance. So far as he personally is concerned, if his duties to his wife are left out of consideration, this right is doubtless absolute. But in reference to the rights, duties, and liabilities of the parties in their marital relations it is not absolute. It should be exercised with some reference to the welfare of the wife. We can conceive of a choice of a domicile so plainly unreasonable and improper, in reference to the health and welfare of the wife, that the selection of it, and an attempted enforcement of his general marital right to have her share it with him, would be extreme cruelty, such as would justify her in declining to accompany him or follow him to such a place of abode. His wife's marital right and his duty as a husband would come in conflict with the exercise of his general right to choose his own domicile, if he attempted to exercise the right in such a way as would be utterly and grossly unreasonable because of the peril to her life and health, and perhaps because of her deprivation of other things essential to her welfare. But the determination of such matters must, in the first instance and ordinarily, be left to the husband, upon whom rests the legal duty to provide for his family, as well as for himself. The wife cannot legally refuse to accompany him in a change of domicile unless such a change is plainly unreasonable. See Keech v. Keech, L. R. 1, P. & D. 641; Hair v. Hair, 10 Rich. Eq. (S. C.) 163; Hardenburgh v. Hardenburgh, 14 Cal. 654. There is nothing in the present case to show a legal excuse for the wife's refusal. There was nothing very difficult in the distance, or in the time required for the journey, or in the discomfort attending it. The removal from the old home to the new one would have involved no change of race or language in the wife's companions. It included departure from her native land and separation from the friends of her youth. But these are no more than common experiences nowadays. In these years of emigration, to hold that a wife ought not to be required to accompany her husband from England to America, if his interest and those of his family would be greatly promoted by such a change, would impede social progress and individual advancement.

We are of opinion that the ruling as matter of law that the libelee was not guilty of desertion was erroneous. In our opinion the evidence would warrant a finding that, without other excuse than her disinclination to leave her native land, she willfully refused to accompany her husband to America when his interests and those of his family required such a change of domicile, and that she persisted in this refusal. This would justify a finding of utter desertion on her part.

The alleged desertion referred to in Bishop v. Bishop, 30 Pa. 412, occurred nearly 50 years ago, when conditions were very different from those at present, and the decision was made to depend upon a question of jurisdiction under the statutes of Pennsylvania.

Decree for libelant.[39]

DOUGLASS v. DOUGLASS.

Supreme Court of Iowa, 1871. 31 Iowa, 421.

Action for divorce. The district court dismissed the plaintiff's petition, and rendered judgment against her for costs; she appeals.

COLE, J. The plaintiff bases her claim for divorce upon the fourth subdivision of Revision, § 2534: "When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years." There is no conflict in the evidence as to the facts of the case. The parties were married in September, 1858; they lived together happily until the 14th day of September, 1867, during which time there were four children born to them, three of whom had died. Prior to the time last stated, the defendant became insane, and was sent to the asylum at Mt. Pleasant, and a guardian for his property, etc., was appointed. At that date, having been discharged from the asylum as cured, the defendant returned to his friends, but refused to live with plaintiff as his wife; he made his home with his mother in the same neighborhood, and engaged in his usual work, but refused to provide in any way or part for plaintiff or their child. In February, 1868, there was a judicial examination as to his condition, and he was pronounced sane, and then settled with his guardian, who was discharged. At this examination the defendant asserted that he never intended to live with plaintiff again, but gave no reason, and refused to do so when asked. In the April following (1868), the defendant was again sent to the asylum, and another guardian appointed. The defendant corresponds with his friends, but refuses to

39 As to the wife's duty to live with her husband in the home of his relations, the decisions depend upon the circumstances. She has a right to preside over a home of her own unless the necessities of the situation require other arrangements. Marshak v. Marshak, 115 Ark. 51, 170 S. W. 567, L. R. A. 1915E, 161, Ann. Cas. 1916E, 206 (1914). See Ewing v. Ewing (Md.) 140 A. 37 (1928), for a consideration of the question.

write to his wife, although she has written him and urged him to answer. The defendant has never abused the plaintiff, nor have they had any particular quarrel. Plaintiff has earned her own living and the support of her child since he first went to the asylum; she is a woman of excellent character. This suit was brought in March, 1870.

This evidence satisfactorily establishes the fact that the defendant has willfully deserted his wife without a reasonable cause, and that he has absented himself for the space of two years. This is not controverted; but it is claimed that the statute requires that both the desertion and absence shall be without a reasonable cause. For the purposes of this decision that construction might be conceded, though it may well be questioned whether the true and correct construction is not that the wife shall be entitled to a divorce when the defendant willfully deserts her without a reasonable cause and absents himself for two years. See Hewes v. Hewes, 7 Gray (Mass.) 279; Besch v. Besch, 27 Tex. 390. But, even if it be held that the reasonable cause applies equally to the absence as to the desertion, then the inquiry as to the meaning of the term "reasonable cause" in this connection. Does it mean that the husband, having willfully deserted his wife, shall, by showing a reasonable cause for his continued absence, defeat the wife's right of action? If so, suppose he should show that he became engaged in a very profitable mining operation and was accumulating wealth very rapidly for his family, which would have been sacrificed by his return to his wife within the time? This would ordinarily be regarded as a reasonable cause for a protracted absence. Or, suppose he became unjustly suspected of the crime of murder and was wrongfully arrested and committed for trial, whereby he was detained beyond the two years. This would surely be a reasonable cause for his delay in returning. But this is not the meaning of the statute. The statute means that if the husband willfully deserts his wife when she has not by her conduct given him a reasonable cause, and shall absent himself for two years when she has given him no reasonable cause for remaining away, then she shall be entitled to a divorce. The reasonable cause of the statute can only be established by showing wrongful conduct on her part, amounting to a good excuse for his absence. No other reasonable cause for the two years' absence than that arising from the acts, declarations or conduct of the wife can be shown to defeat her right of action. In other words, the absence of the husband must be excused by the fault of the wife, and not by the fault or misfortune of the husband.

This must be the correct construction of the statute. For, if the term "reasonable cause" applies equally to the "desertion" and the "absence," then it must apply to them in the same sense. And it will not admit of controversy that when a husband willfully deserts his wife, he can justify that action only by showing wrong or fault on her part. As it is clear that no fault or misfortune of his will excuse his willful desertion, so no fault or misfortune of his will excuse his

absence for the space of two years. The statute, it will be observed, does not require that the absence shall be willful.

How much soever we may sympathize with the defendant in his misfortune and would be ready to commend the self-sacrifice and devotion that would lead the plaintiff to cling closer to him, even though his affection, like his reason, may be permanently clouded, yet the statute is the measure of the plaintiff's rights, and it is our duty to enforce it. Reversed.[40]

BECK, J., dissenting.

(D) MISCELLANEOUS GROUNDS

LEONARD v. LEONARD.

Supreme Judicial Court of Massachusetts, 1890. 151 Mass. 151, 23 N. E. 732, 6 L. R. A. 632, 21 Am. St. Rep. 437.

Appeal from Superior Court, Suffolk County; John Lothrop, Judge.

Libel for divorce from the bonds of matrimony by Libby Leonard against James Leonard. The libel was dismissed, and the libelant appealed.

C. ALLEN, J. The libelant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years and six months; and the question presented to us is whether such a sentence passed in another State is a good cause of divorce here. Pub. St. c. 146, § 2, provides that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction." The first statute in this Commonwealth making a sentence to imprisonment a cause of divorce was Rev. St. c. 76, § 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards, by St. 1838, c. 126, and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offence, the nature of which was known to the Legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable here at all. The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this Commonwealth. Beard v. Boston, 151 Mass. 96, 23 N. E. 826. No in-

[40] The weight of authority is contra. See 4 A. L. R. 1333, for the cases. See, also, 51 A. L. R. at 769 for the cases arising under statutes that make "separation" as distinguished from desertion, a ground of divorce. But, if the statutory period of desertion has accrued, before the insanity, the divorce will be granted. Wright v. Wright, 125 Va. 526, 99 S. E. 515, 4 A. L. R. 1331 (1919).

stance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was intended, it would be natural to say so in distinct language, as in Rev. St. c. 144, § 34. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of Pub. St. c. 146, § 2. Martin v. Martin, 47 N. H. 52, 53.

Libel dismissed.[41]

NOTE ON MISCELLANEOUS GROUNDS FOR DIVORCE[42]

Adultery, cruelty, desertion, and imprisonment are the most common and important grounds for divorce. But in many states divorces, either a vinculo or a mensa et thoro, are granted for other reasons. See Stimson, Am. Stat. Law, § 6201 (2), impotence; section 6201 (5), intoxication habit; section 6201 (6), nonsupport; section 6201 (8), disappearance of either party; section 6201 (10), joining a religious sect disbelieving in the marriage relation; section 6201 (13), for causes rendering the marriage originally void or voidable, e. g., incestuous marriage, bigamous marriage, mental incapacity, fraudulent marriage, antenuptial pregnancy, etc.; section 6201 (15), indefinite causes at discretion of the court; section 6201 (16), voluntary separation for a certain period; section 6201 (18), incurable insanity; section 6201 (19), concealment of a loathsome disease; section 6213, omnibus clauses, e. g., "for any misconduct as permanently destroys the happiness of petitioner and defeats the purpose of the marriage relation," "for any other cause deemed by the court sufficient, if satisfied that they can no longer live together," "for the habitual indulgence of a violent and ungovernable temper," etc. See, also, the following references: Note in 39 L. R. A. 262, at page 264 (1897), whether use of drugs comes within intoxication or cruelty clauses; note to Mohler v. Shank, 93 Iowa, 273, 61 N. W. 981, 57 Am. St. Rep. 274 (1895), in 34 L. R. A. 161, on insanity as a ground for divorce; note to Dennis v. Dennis, 68 Conn. 186, 36 A. 34, 57 Am. St. Rep. 95 (1896), in 34 L. R. A. 449,

41 Accord: Klutts v. Klutts, 5 Sneed (Tenn.) 423 (1858); Martin v. Martin, 47 N. H. 52 (1866).

Most American states make conviction of felony, or imprisonment for more than a specified period, a ground for divorce. In a few states, the question involved in the principal case is answered by express provisions in the statutes. In some states the statutes provide that the conviction of certain crimes shall, without legal process, dissolve the marriage.

In Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164 (1906), it was held that an executive pardon, given after conviction and sentence, did not avoid the other spouse's right to a divorce, under the statute. In several states the statute expressly provides that a pardon shall have no effect on the right to divorce. In Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843 (1897), and Sargood v. Sargood, 77 Vt. 498, 61 A. 472 (1905), it is held that, where the sentence is for the term provided in the divorce statute, an allowance for good behavior will be disregarded.

42 Vernier's Cases on Marriage and Divorce, pp. 141, 142.

on drunkenness as a ground for divorce; Page v. Page, 43 Wash. 293, 86 P. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054 (1906), who is an habitual drunkard; Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 820 (1896), and Jorden v. Jorden, 93 Ill. App. 633 (1901), definition of "impotence." Under the Kentucky statute, providing for a divorce where the parties have lived apart for five consecutive years next before the application, a divorce will be granted, though it appear that the separation was due to the fault of the party asking it, Clark v. Clark (Ky.) 53 S. W. 644 (1899), and the living apart is voluntary, within the meaning of this statute, where the husband is imprisoned for life, since he is at fault, Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. 403 (1897). Sodomy is a proper cause under the Washington statute (any cause deemed by the court sufficient). Poler v. Poler, 32 Wash. 400, 73 P. 372 (1903). But the mere fact that the parties quarrel and live together unhappily is not a cause under this statute. Stanley v. Stanley, 24 Wash. 460, 64 P. 732 (1901); Wheeler v. Wheeler, 38 Wash. 491, 80 P. 762 (1905). [But see Taylor v. Taylor, 145 Wash. 234, 259 P. 385 (1927).] Failure to support is no ground for divorce, where the husband has not the means or ability to furnish support. Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642 (1897); Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389 (1904); Deneen v. McLeod, 21 C. S. 54 (Quebec 1901), inability due to insanity.

SECTION 3.—DEFENSES

(A) Collusion

SQUIER v. SQUIER.

Supreme Court of Vermont, 1926. 99 Vt. 452, 134 A. 529.

Petition for divorce by Charles B. Squier against Olive B. Squier. From a decree dismissing the petition, libelant appeals. Decree affirmed.

Fish, J. An absolute divorce was prayed for and the petition was uncontested. The court found that prior to the trial, the parties, believing that the libelee had a meritorious defense, entered into an agreement whereby the libelee, in consideration of libelant's promise to make financial provision for her, was to make no defense. This finding, if supported by evidence, is conclusive in support of the decree dismissing the petition. So the one exception we find it necessary to consider is the one to this finding. The transcript which is before us shows that the finding is amply supported by the testimony of the libelant himself, who admitted that such a contract was made; and that part of the finding that refers to a belief in the libelee's defense is fairly inferable from the circumstances.

That such an agreement as was entered into was collusive is sustained by the following authorities: Sheehan v. Sheehan, 77 N. J. Eq. 411, 77 A. 1063, 140 Am. St. Rep. 566; Lanktree v. Lanktree, 42 Cal. App. 648, 183 P. 954; Dinsmore v. Dinsmore, 128 Va. 403, 104 S. E. 785; Adams v. Adams, 25 Minn. 72; 9 R. C. L. 168; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689. Note 5 to this case, found on page 706 of 2 A. L. R., states the law on this question and discusses the whole subject in connection with the cases.

Decree affirmed.

THOMPSON v. THOMPSON.

Supreme Court of Michigan, 1888. 70 Mich. 62, 37 N. W. 710.

Bill for divorce. Decree dismissing bill affirmed. The facts are stated in the opinion.

CHAMPLIN, J. In this case the complainant filed his bill praying a divorce from the defendant, on the ground of cruel and inhuman treatment. He averred in his bill—

"That the acts done and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity, or procurement of your orator, and that such bill is not founded upon or exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto, or between your orator and any other person."

Section 6232, How. Ann. St., provides:

"No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent."

The bill of complaint was taken as confessed by the defendant after personal service of subpœna upon her.

After testimony had been taken before a commissioner, the court ordered the complainant to appear personally before the court, and give testimony in the cause. From his testimony it appears that, before the bill was filed, complainant made offers to his wife to get her to release all interest in his property. He testified:

"I told her I would not pay her the $500 unless she would get a divorce, or let me,—I did not care which; that I was going to have, and have things solid, or I would not pay anything; that I was going to get clear if I paid that much. I told her if she would make out the writings that way, so that I could get a divorce, or she could,—I did not care which,—I would pay her the $500 just as she wanted it. She wanted I should get the divorce if I paid her for it. She did not want any. I told her I would not pay unless I got one."

After this she executed a quitclaim deed, and signed an agreement, set out in full in the record, as follows:[43] * * *

Complainant then paid her $500, and filed his bill in this cause.

The circuit court dismissed the bill of complaint, and complainant appeals.

His counsel claims that the statute only refers to that class of cases where parties, without any cause for a divorce, agree together collusively to obtain a decree; and that in this case the testimony shows that complainant had a legal cause for divorce.

We do not feel called upon to decide whether the complainant had a legal cause for divorce under the testimony. The agreement made was in contravention of the statute. It is immaterial whether complainant had cause for divorce or not. The statute is based upon public policy, which forbids the annulment of the marriage contract by the agreement of the parties. Such an agreement is collusive, and a fraud upon the court, which requires a positive averment that the bill of complaint is not exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto. Chancery rule 95.

The decree of the circuit court is affirmed.

SHERWOOD, C. J., and MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

GARRISON, Vice Chancellor, in SHEEHAN v. SHEEHAN (Court of Chancery of New Jersey, 1910) 77 N. J. Eq. 411, 77 A. 1063, 140 Am. St. Rep. 566: "In some of the authorities above cited it will be found that the court, upon being satisfied that the defendant and complainant had agreed that the suit should be brought, had dismissed the suit without prejudice to the right to bring another one not the result of such collusion. My own view of the situation, briefly stated, is this: The policy of our law favors marriage, and disfavors divorce. Parties may not be permitted to make agreements with respect to divorce suits which would be perfectly proper to be made in other litigations. In divorce suits public policy requires that certain agreements shall not be made between the parties, and, when such interdicted agreements are made, they are termed 'collusive.' What is termed 'collusion' in divorce suits is a definite kind of agreement of parties concerning the divorce. If collusion is to be limited (as some of the definitions would limit it) to 'a corrupt bargain to impose a case upon the court'—that is, either by the suppression of evidence or by the manufacture there-

[43] The text of the agreement is omitted. After reciting that husband and wife had separated in consequence of mutual disagreements and had agreed to live apart, it provided that the wife was to receive $500 in lieu of dower and other interest in the husband's property, that she was to support herself, contract no debts for which the husband should be liable, and, in case he sued for divorce, that "she will put him to no additional costs therein, and make no claim for allowance, alimony, or maintenance in said divorce proceedings."

of—then each case where there was an agreement between the parties would have to be investigated to see whether such an agreement came within the interdiction of the definition of collusion. But if collusion is given an ampler definition, so as to include any agreement between the parties as a result of which no defense shall be made, then the case will not be investigated after the ascertainment that there is such an agreement, because that agreement itself would be within the definition of collusion, and would defeat the suit.

"I cannot escape the conviction that our statute which requires an affidavit by the petitioner that 'the said petition is not made by reason of any collusion * * *' indicates that with us 'collusion' must be given the broader and ampler definition. It seems to me to be perfectly clear that if a man and wife agree that one of them shall bring a suit for divorce against the other, and that no defense shall be made, such an agreement should be included in the definition of collusion. And it also seems clear to me that, when they have thus agreed, the party making the petition certainly makes it by collusion. This definition, of course, would not include cases in which the defendant was willing the suit should be brought or was even anxious or desirous that it should be brought, but would include cases where the defendant and the petitioner agreed that it should be brought, and that no defense shall be made a fortiori where he not only agrees that it should be brought and be undefended, but advances money to induce its bringing.

"My reason for thinking that the definition should be the broader one is that it would then be clearly and consistently in keeping with the public policy which we maintain in this respect, because, if we limit the term 'collusion' to the narrow definition (which only includes the suppression of evidence or the manufacture thereof), and permit agreements that suits shall be brought in which no defense shall be made, we are creating by such permission a situation in which the chances of our ever finding out the truth concerning the matter are almost zero. If parties agree that one of them shall bring a suit and the other will not defend, it is impossible to escape the conviction that the court will have practically no opportunity to ascertain whether evidence is suppressed or manufactured evidence is offered. I do not wish to be understood as including within the definition of collusion agreements by which the husband contracts to pay a certain amount of alimony to his wife without the intervention of the court. I do think, however, that within the definition of 'collusion' should be those cases in which the husband agrees with the wife that he will furnish a sum of money with which she is to procure a divorce against him. I think that what has been done in some courts should be done in such cases; that is, where the court is convinced that there is not manufactured testimony or suppressed evidence, but that the suit is collusive because of the agreement, the suit should be dismissed without prejudice to the right to bring another suit which shall not be collusive. I am clearly of opinion that, if it be held that an agreement between husband and wife that

suit shall be brought and no defense entered is within the definition of collusion, the court should infer such an agreement from the fact that the husband has before the suit was begun advanced money to the wife or to a lawyer for the wife for the purpose of bringing the suit.

"As is pointed out by Chancellor McGill, Vice Chancellor Bergen, and other judges, it is a shallow pretense that there is any intention to defend if the defendant furnishes money for the prosecution of the suit, and it certainly is not a violent inference for the court to find an agreement in consonance with the defendant's act in furnishing the money to enable a suit to be brought against him.

"The result is that the petition in this case will be dismissed without prejudice to the right of the petitioner to bring any suit free from collusion." [44]

(B) CONNIVANCE

NOYES v. NOYES.

Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 20, 79 N. E. 814, 120 Am. St. Rep. 517, 10 Ann. Cas. 818.

Libel, filed November 16, 1904, for divorce on the ground of adultery alleged to have been committed with one Dodge.

The answer contained a general denial, and alleged condonation and connivance. * * *

[44] While collusion was, apparently from the earliest times, in England, a ground for refusing a divorce in the ecclesiastical courts, no public official, other than the judge before whom the suit was tried, had the duty of investigating to discover collusion, nor to intervene to object to the divorce. In 1860, by an amendment to the Matrimonial Causes Act of 1857, the Queen's Proctor, was authorized, by leave of court and by direction of the Attorney General, to intervene in divorce causes to prevent collusion. In some of our states there are statutes giving to representatives of the state the power to intervene, or appointing officers to represent the state on the hearing of divorce causes. In the absence of such statutes, the situation is as it was in England prior to 1860. State ex rel. Fowler v. Moore, 46 Nev. 65, 207 P. 75, 22 A. L. R. 1101 (1922).

Where the husband, by a prearranged plan with his wife to furnish ground for divorce, commits adultery and permits himself to be caught, it is collusion. Todd v. Todd, L. R. 1 Prob. & Div. 121 (1866). But, if there is no prearrangement with the wife, the result is otherwise, though the husband commit the offense in order to furnish ground for divorce. Crewe v. Crewe, 3 Hagg. Ecc. 123 (1800).

See, for good general discussion, Churchward v. Churchward [1895] Prob. Div. 7; Griffiths v. Griffiths, 69 N. J. Eq. 689, 60 A. 1090 (1905). See, also, 2 A. L. R. 699.

While a divorce will be refused, if collusion is discovered before it is granted, and may be vacated afterward, yet a party cannot, as a matter of right, ask to have it vacated, and the court will refuse to vacate the decree, if it would be inequitable to do so, as, for example, where the other party has remarried. See Singer v. Singer, 41 Barb. (N. Y.) 139 (1863); Henderson v. Henderson, 32 N. D. 520, 156 N. W. 245 (1916).

Courts will not permit the same attorney to represent both sides in a divorce suit. See Todd v. Rhodes, 108 Kan. 64, 193 P. 894, 16 A. L. R. 423 (1920).

The judge ordered that the libel be dismissed. To this order and to the ruling stated above the libellant alleged exceptions.

HAMMOND, J. The trial judge found that the libellant arranged, as stated in his testimony which is recited in the bill of exceptions, with one Dow that an opportunity should be afforded the libellee by permitting her and the co-respondent to pass the evening of November 5 alone in Dow's house, without interference and interruption by other persons, although such permission had theretofore on the morning of the preceding day been refused the libellee by Mrs. Dow, and having so found, "ruled as matter of law that the facts so found were connivance on the part of the libellant." He thereupon ordered that the libel be dismissed, "and to the rulings aforesaid and said order the libellant duly excepted." In an amendment to the bill it is stated that the finding was made only upon the evidence recited in the bill.

It is contended by the libellant that the only question arising on the record is whether the testimony of the libellant, which is the only testimony reported, shows as matter of law connivance; but we do not so interpret the record. The only ruling made was that certain facts found by the trial court constituted in law connivance, and the question whether the evidence warranted the finding does not seem to have been raised. The evidence upon which the finding was made was circumstantial to a certain extent; and according to the relative degree of credit to be given to the libellant's denials of inferences which might be drawn against him from the facts stated by him, the finding might be either way. The judge evidently placed more reliance upon the legitimate inferences from the facts stated by the witness than he did upon the denial of the inferences. The witness was before him, and as he went on the judge had an opportunity by observing him to test his sincerity in his denials.

Even if the question whether the finding is sustained by the evidence is before us, we are of the opinion that it is so sustained. The evidence warranted the finding that the libellant desired that on the night in question his wife should commit adultery, or at least that she should be placed in such a compromising position as to lead to the inference of the committal of that act; that he desired to do this so that he might get a divorce and be freed from her and his real estate be free from any claim on her part; that Mrs. Dow, who was to be away, had refused the libellee the use of the house for that evening; that the libellant knew it and feared that Dow might be at home; and that the libellant's purpose in seeing Dow was to induce him to stay away, not only that a crime, if committed, might be detected, but that it might be committed; and that in that way, by active exertion, he aided in procuring the house for an adulterous use by his wife, when otherwise she would not have had it. In other words, the evidence warranted the finding made by the judge that the libellant arranged with Dow that the house should be used by

his wife without interference or interruption on the part of other persons, although such permission had been refused by Mrs. Dow. Under the circumstances of the case this must be held to be a finding that the libellant did this to facilitate the committal of adultery by his wife.

Was such an act as matter of law connivance on the part of the libellant? The law upon this subject was quite fully considered by this court in Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237, Morton, J., speaking for the court, uses the following language: "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact.[45] He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce (5th Ed.) § 9; Timmings v. Timmings, 3 Hagg. Eccl. 76; Stone v. Stone, 1 Rob. Eccl. 99, 101; Phillips v. Phillips, 10 Jur. 829."

Applying the law to the findings of the court as interpreted by the issues on trial, it is clear that the ruling that as matter of law the facts show connivance was correct. By his arrangement with Dow the libellant assisted his wife on "her path to the adulterous bed." It is immaterial that she was unaware of this assistance. As additional cases bearing upon the law of connivance, see Morrison v. Morrison, 136 Mass. 310; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

Exceptions overruled.[46]

45 Accord: Engle v. Engle, 153 Iowa, 285, 133 N. W. 654 (1911); Farwell v. Farwell, 47 Mont. 574, 133 P. 958, Ann. Cas. 1915C, 78 (1913); Brown v. Brown, 62 N. J. Eq. 29, 49 A. 589 (1901), reversed on the evidence in 63 N. J. Eq. 348, 50 A. 608 (1901); Warn v. Warn, 59 N. J. Eq. 642, 45 A. 916 (1899); Reiersen v. Reiersen, 32 App. Div. 62, 52 N. Y. S. 509 (1898); and Tuck v. Tuck, 117 App. Div. 421, 102 N. Y. S. 688 (1907).

46 Accord: May v. May, 108 Iowa, 1, 78 N. W. 703, 75 Am. St Rep. 202 (1899); Torlotting v. Torlotting, 82 Mo. App. 192 (1899); Karger v. Karger, 19 Misc. Rep. 236, 44 N. Y. S. 219 (1897); McAllister v. McAllister (Sup.) 137 N. Y. S. 833 (1912). So, also, a husband cannot obtain a divorce for the wife's adultery, where he deserted her in a large city, with but a trifling sum to provide for her wants. Heidrich v. Heidrich, 22 Pa. Super. Ct. 72 (1902). And see Moore v. Moore, 102 Tenn. 148, 52 S. W. 778 (1899). In Dennis v. Dennis, 68 Conn. 186, 36 A. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95 (1896), where the wife directed her attorneys to employ detectives to procure evidence, and the detectives hired a lewd woman to lure the husband into an act of adultery, the

PIKE v. PIKE.

Court of Chancery of New Jersey, 1927. 100 N. J. Eq. 486, 136 A. 421.

Suit for divorce by Dorothy Palmer Pike against Crozier L. Pike. Petition dismissed, and defendant's counterclaim denied.

BENTLEY, Vice Chancellor. On petition for divorce, filed by the wife, on the ground of desertion, and a counterclaim charging adultery.

At the time of the final hearing, the petitioner failed to appear, although her counsel was present and took such part as he could in opposition to the counterclaim without the presence and assistance of his client. The defendant moved his counterclaim, and the matter was heard upon that pleading.

The parties were married in December, 1922, when the defendant was 26, and the petitioner was 20. He appears to be a man of education and refinement. Unlike the usual marriages, these parties never took up their residence together, and neither one of them was held out to society as the other's spouse. He continued to reside at the home of his parents in this state, while his wife took up her abode with her mother as a single woman. While living in this state of physical separation, she was discovered by her husband in a room, at night, with a man named Mandell, under circumstances that were ample to convince anybody that she had been guilty of adultery with him. That act was condoned, and her husband afterwards supported her by payments of a weekly stipend until the 2d day of October, 1925, when she unquestionably again committed adultery with a man named Proctor, in her bedroom in a New York hotel, where she was living, to the knowledge of her husband, as an unmarried woman.

This man is not entitled to any relief at the hands of this court, because of his own conduct. It will have been observed that, although he had gone through the marriage ceremony with this woman, he never

wife's suit was held to be barred on the ground of connivance, even though she may not have expressly directed employment of the woman. See, also, to same effect, Gower v. Gower, L. R. 2 Prob. Div. 428 (1872). In Lovering v. Lovering, 3 Hagg. Ecc. 85 (1792), Hedden v. Hedden, 21 N. J. Eq. 61 (1870), and Woodward v. Woodward, 41 N. J. Eq. 224, 4 A. 424 (1886), it was held that a husband who connives at one act of adultery cannot object to a subsequent act. Contra: Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187 (1903). Cf. Hodges v. Hodges, 3 Hagg. Ecc. 118 (1795); Hodges v. Windham, Peake, 53 (1791); and Stone v. Stone, 1 Rob. Ecc. 99 (1844). But connivance at one act of adultery will not bar divorce for an earlier act. Millard v. Millard, 78 Law T. (N. S.) 471 (1898); Viertel v. Viertel, supra; Morrison v. Morrison, 142 Mass. 361, 365, 8 N. E. 59, 56 Am. Rep. 688 (1886); Bailey v. Bailey, 67 N. H. 402, 29 A. 847 (1892). The Morrison Case, however, says that the character of this connivance may be so open and revolting as to indicate that the husband is not injured even by a prior act not expressly consented to.

In Lankester v. Lankester, 94 Law J. P. 71, [1925] P. 114, 133 Law T. 349, 41 Times Law Rep. 594, a husband who had in good faith assisted his wife in obtaining a void foreign divorce was held to have connived at her adultery, which consisted in marrying and living with another man. Observe the function of the King's Proctor.

discharged any of his obligations incident to his status as her husband, except the mere, material, financial means of animal sustenance. Added to that is the further fact that he knew, when he married his wife, that she was a weak vessel and required unusual protection. At the close of his cross-examination, he was engaged in the following conversation:

"Q. How old were you at the time you were married? A. Twenty-six.

"Q. How old was your wife? A. Twenty.

"Q. Was she then engaged in theatrical work? A. She had been on the stage before, and when she wasn't on the stage she was a model.

"Q. Did you know, before your marriage, of any sexual intercourse she had ever had, either with you or any one else? A. Yes.

"Q. If you knew of her weakness, why didn't you do something to protect her from the likelihood of her committing adultery? A. Well, it was rather difficult to do that without living with her, you see.

"Q. Were you willing to risk the destruction of the soul of the woman you married, rather than to face some other consequence? A. (The witness does not answer.)"

The explanation given, either by the defendant or his counsel, to explain the former's failure to make a home for his wife was that he had recently entered upon the export business at the time of his marriage and was still dependent upon his father for his support and perhaps the capital that was required in his vocation. His marriage had been a secret one, and he was apprehensive that, if the fact became known to his parents, he would be cast adrift to fend for himself. A sorrier excuse could hardly be given.

Under the circumstances of this case, a husband is under a peculiar duty to protect his wife against her own weakness. The defendant knew at the time of his marriage that his wife had been unable to resist temptation and had been the victim of seduction. Not only did he fail to give her a home, but he never even gave her his name. He never threw around her the protection that every husband is supposed to give his wife, however moral she may be. He did not give her the comfort of his society, as a man is supposed to do. She was left, under all these circumstances, with abundant opportunity to seek the solace of the companionship of others, and the inevitable came to pass. * * *[47]

In the case sub judice, as in all other similar suits, the actor comes into court to complain of a wrong perpetrated upon him, or her, with regard to the contract or status of the parties. It is elementary in our jurisprudence generally (not only in divorce suits) that in such a case the complainant, whatsoever his position may be denominated, must not himself have been guilty of any wrong or neglect of duty upon his own

[47] The court here quoted from Hedden v. Hedden, 21 N. J. Eq. 61 (1870), and Cane v. Cane, 39 N. J. Eq. 148 (1884).

part with regard to the subject-matter of the proceedings. It is pointed out in 2 Bish. Marr., Div. & Sep. § 345, that in an action for damages for personal or other injury by reason of the defendant's negligence, the plaintiff, to recover, must have been free from carelessness contributing to the injury.

In an action ex contractu, resting upon mutual and dependent promises, the plaintiff must have kept his promise. Nor can one enforce a contract, so called, founded upon the violation of a statute, for he himself has been guilty of a wrong in the premises. Therefore the complaining party is left where he is found, because of his own failure to observe the law or perform his duty. It is not the meaning of this doctrine that the defendant's wrongdoing in the case at bar, in failing to give that protection to his wife that the law casts a duty upon him to give, has clothed the petitioner with any right to break the law. She is quite as liable to a criminal prosecution for her illegal act as if the conduct of her spouse was unimpeachable. Although this defendant has suffered what would otherwise have been a grievous injury, he should not be heard to complain of consequences which he must be considered to have foreseen, and which have fallen upon him as the result of his failure to perform his duties. His neglect of his wife renders her misconduct no less reprehensible, morally or criminally, but when he complains of his private injury, produced in large part by his failure to perform his duties to her, his complaint falls on deaf ears so far as this court is concerned.

Thus we have a case showing a man of maturity, education, and refinement, marrying a woman known by him to be susceptible to the blandishment of designing men, who compels her to live apart from him without any of the protecting influences that he was bound to provide around her, who saw her engaged in two occupations perhaps more perilous to the chastity of women that any other calling permitted by the law, and who did not offer to provide a home for her, even after he had discovered and forgiven her first matrimonial offense. It seems to me that it would be hard to find a case lying more squarely within the rule so clearly expressed in the above opinions; viz., if a husband sees what a reasonable man cannot see without alarm, knowing his wife to have exhibited her weakness by antenuptial incontinence:

"He is called upon to exercise peculiar vigilance and care over her, and if he sees what a reasonable man could not permit and makes no effort to avert the danger, he must be supposed to see and mean the result."

Of course, it is not to be deduced from anything said herein that in ordinary marriages an innocent party is under any duty to interfere with an act of adultery by his or her spouse after suspicion is aroused in the former's breast, but where the opportunity and desire are entirely the creation of the latter and the paramour, and the former had no reason to suspect the chastity of the latter at the time of the marriage. The former may spy and watch the movements and the actions

of the other without an effort to frustrate the guilty desire. Lehman v. Lehman, 78 N. J. Eq. 316, 79 A. 1060. But when a husband is put upon his guard, the peculiar duty mentioned above devolves upon him, and he cannot be recreant to it and then expect the assistance of this court.

It so happens that in the cases quoted above the husband, in each instance, had seduced his wife before marriage, but a reading of the opinions clearly discloses that that was not the reason for the decision. In both cases it is made apparent that the husband takes, upon his marriage to a woman whose failing he knows, the duty already discussed, which is far beyond his obligation in the case of his marriage to a woman he believes to be pure and against whom it would be an insult to exhibit the slightest suspicion until cause had been given therefor. The language in the Hedden Case, supra, specifically, is, "if he knows that his wife has been guilty of antenuptial incontinence, *or* if he has himself seduced her before marriage," he must exercise peculiar vigilance and care. (Italics mine.) The question of antenuptial incontinence was not present in the case of Delaney v. Delaney, 71 N. J. Eq. 246, 65 A. 217, reversing Id., 69 N. J. Eq. 602, 61 A. 266, or Atha v. Atha, 94 N. J. Eq. 692, 121 A. 301, affirmed in 95 N. J. Eq. 275, 122 A. 926, although in both instances the Hedden Case [21 N. J. Eq. 61] and the Cane Case [39 N. J. Eq. 148] were used as a basis for the decisions. The court went much further and simply based the decision upon that part of the rule expressed in the last-mentioned cases, which says that if a husband, under the circumstances of this case, complacently observes what a reasonable man could not see without alarm, he must be considered to realize to what it tends and to mean that the event shall occur. The husband, in the case sub judice, after two warnings of the inability of his wife to control her sexual appetite, still continued, as already pointed out, to allow her to reside alone as an unmarried woman while surrounded by the enticement and the character of the men always to be met by a woman employed as she was.

It was urged upon the argument that this man's position is an impossible one. That may be so, unless he shows himself to be the man he did when he forgave her first adultery, recognizing his own shortcomings, and makes an earnest effort to carry out the solemn vow he expressed at the time the petitioner became his wife. He was not an ignorant boy at the time of his marriage. He was a fully matured man of 26, sound of body and mind, who should have experienced no fears of his ability to earn a livelihood for her and himself. There would be few marriages if every young man should postpone his wedding until he had amassed a fortune or established a successful business. But whether his lot be a hard one or not, the policy of our law forbids this court to give him any relief, and, if such is to be had, it must be secured from that branch of the government to whom is committed the authority to declare the policy of the state. Whether relief should be given in a case like this is, at least, problematical, in view of

the lightness with which this solemn ceremony is so frequently entered.

The petition should be dismissed for lack of any evidence, and the prayer of the counterclaim denied.[48]

(C) CONDONATION

SHACKLETON v. SHACKLETON.

Court of Chancery of New Jersey, 1891. 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478.

VAN FLEET, V. C. This is a suit by a wife against her husband for divorce. The charge is adultery. The husband's guilt is proved. There is no difficulty on that score, but the case nevertheless presents a debatable question, and that is, whether all the wrongs on which the complainant's right of action rests have not been pardoned?

The parties were married in August, 1867. They have five children. They all live with their mother. The proofs show that the defendant induced another woman, by falsely representing himself to be a single man, to enter into a contract of marriage with him, in November, 1881, and that he and she, from that date on until April, 1889, lived together as husband and wife. During the same period the defendant also lived with the complainant as his wife. He, however, spent the greater part of his time with the other woman. His adulterous intercourse with her extended over a period of more than seven years. In April, 1889, this other woman brought a suit for divorce against the defendant, for adultery, in the superior court of the city of New York. He was then a citizen of this state, and notice of that suit was given to him by publication in a New York newspaper. The complainant saw that publication soon after it was made, and she admits that it led her to suppose that the defendant had lived with this woman as his wife. She did not see the defendant, after the publication came to her knowledge, until the 29th day of May following. She then accused him with having committed adultery with this woman. He assured, her, with great earnestness, that the charge was false, and told her that if she would go with him to his lawyer and to one of his employers, he could satisfy her of his innocence. She says she told him that she believed him to be guilty, notwithstanding his protestations of innocence, and also that she would never forgive him. She admits that the truth is that she believed he was guilty in spite of his denials. And she frankly con-

[48] Accord: Mayer v. Mayer, 5 Ohio Dec. Reprint, 444, (1877). See, also, Re Simmons Divorce Bill, 12 Clark. & F. 339 (1845); Forrest v. Forrest, 8 B. C. 19, 21 Can. L. T. 219 (1901).

The English Matrimonial Causes Act of 1857, 20 and 21 Vict. c. 85, § 31, gave the court discretion to deny an absolute divorce where the plaintiff has been guilty of conduct "conducing to the defendant's adultery."

fesses that she had sexual intercourse with him during the night of the day on which this conversation occurred. Her evidence shows that it was voluntary. He went to bed first, she entered the same bed shortly afterward, and there the intercourse occurred. He left her the next morning and did not return until after this suit was brought. The complainant's bill was filed June 7th, 1889. The important question which this condition of facts raises is, did the complainant, by allowing the defendant to have sexual intercourse with her, on May 29th, condone all his adulteries?

The law is settled that a wife, by voluntarily having sexual intercourse with her husband, after she knows that he has committed adultery, and that she can prove it, thereby pardons his offence. 2 Bish. Mar. & D. § 43; Quincy v. Quincy, 10 N. H. 272, 274. Such act necessarily implies forgiveness. A husband by committing adultery violates one of the most sacred duties imposed upon him by the marriage contract, and by his wrong forfeits all his rights under the contract. By his infidelity he puts it in the power of his wife to have the bond which binds her to him dissolved; it is, therefore, entirely consonant with both reason and justice that if she freely consents to sexual intercourse, after she has full knowledge of his guilt, that her consent should operate as a pardon of his wrong. But condonation in such cases is always conditional and limited; the party forgiven must, to retain the benefit of the pardon, treat the other, in the future, with conjugal kindness and fidelity; and, as a general rule, the pardon extends only to such offences as are known to the pardoning party when the intercourse occurs. With regard to the limitation of this rule, Bishop says: "Alike, in reason and in law, forgiveness cannot take place without a knowledge of the existence of the thing to be forgiven, so that such knowledge is one of the elements of every presumed condonation." 2 Bish. Mar. & D. § 38. An instructive example of the manner in which this principle is applied, is given in Alexandre v. Alexandre, L. R. 2 Pro. & Div. 146. A husband brought a suit against his wife for divorce, on the ground of adultery. The parties were married in January, 1856, and lived together for a short time thereafter and then separated, and did not resume cohabitation until March, 1868. After resuming cohabitation they remained together for only a few weeks. The husband then brought his suit. While they were separated, the wife had a child by another man—it was born in 1860—and after the birth of the child, and before they resumed cohabitation, the wife committed other adulteries. While the negotiations looking to a restoration of conjugal relations were going on, the wife confessed the adultery which resulted in the birth of the child, but concealed those subsequently committed. The question was whether the husband had not, by taking his wife back under the circumstances stated, condoned all her offences, but the court held that the offences committed subsequent

to the birth of the child had not been condoned, because it could not be presumed that the husband had forgiven wrongs that he did not know had been committed.

The doctrine that the pardon implied from sexual intercourse shall extend only to offences known to the pardoning party when the intercourse occurs, is no less a dictate of sound reason than of justice. Willingness to forgive a single offence, or even a series of offences, committed under circumstances of strong temptation, would not give the least support to a presumption that the injured party, if he or she knew the whole truth, would forgive a long course of profligacy. Forgiveness may be so expressed, certainly by words, and possibly also by conduct without words, as to show that the injured party means to blot out the whole past and to forgive everything, both offences known and unknown, but in no case should the court so adjudge, as against an injured wife, except the proofs show very clearly that such was her purpose. The question whether a matrimonial offence has been condoned or not, is always one of intention, and where a wife is the injured party, and her husband claims the benefit of a pardon, and rests his claim on nothing but an implication arising out of her conduct, the court should be extremely careful not to absolve him from the consequences of a wrong which his wife never intended to forgive. It must be remembered that she is the weaker party, and always more or less under the influence of her husband, and that in many cases her chief means of inducing her husband to perform his duties toward her cheerfully and generously, is by yielding to his wishes and trying to please him. A prudent wife, unless her husband is a craven, will always coax rather than attempt to coerce him.

The rule that pardon may be implied from sexual intercourse, is not enforced so rigorously against a wife as it is against a husband. The reasons why this is so are obvious. They were stated by Lord Stowell as follows: "A woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her (D'Aguilar v. D'Aguilar, 3 Eng. Eccl. Rep. 329, 337); she is more sub potestate, more inops consilii; she may entertain more hopes of the recovery, and reform of her husband; her honor is less injured and is more easily healed. * * * It is not improper that she should for a time show a patient forbearance. * * * Weakness in her is pardonable in many circumstances." Beeby v. Beeby, 3 Eng. Eccl. Rep. 338, 340. Notwithstanding the radical changes which, during the last forty years, have been made in the law respecting the property rights of married women, the husband is still, in many respects, the ruler and his wife his subject. Her position is still one of obedience, and when she has no separate estate it is also one of dependence. That is the case here.

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The complainant, when the intercourse occurred which the defendant claims operated as a pardon, was entirely without means and wholly dependent on the defendant for everything.

The principles above stated must control the decision in this case. And they make it clear, as I think, that the complainant is entitled to a decree. The legal effect of the sexual intercourse which she had with the defendant on May 29th was to condone only such offences as she then knew he had committed. She did not then know that he had committed adultery. She says, it is true, that she believed he had, but her belief, it is manifest, was the product of suspicion and not of evidence. Nothing up to that time had come to her knowledge, so far as the evidence shows, which was sufficient to have induced a loyal wife to believe that her husband had committed adultery. All she had heard up to that time was what the newspaper had told her. That was sufficient, undoubtedly, to excite her fears and create suspicion, but it was not evidence, nor even such information as should have induced her to start at once, and before she had given her husband an opportunity to defend himself, in pursuit of information against him. It is the duty of a wife to be loyal to her husband; she must cling to him closer in adversity than in prosperity; believe in him when others doubt; stand by him when every other friend deserts him; defend him against all assailants; and she must be the last person to believe a report tending to disgrace or dishonor him. Knowledge of what the newspaper disclosed did not, in my judgment, impose upon the complainant the duty of going at once in search of evidence against her husband, and so making her chargeable with all the knowledge that she might thus have acquired; on the contrary, I think it was her duty to desist from inquiry until she had given him an opportunity to defend himself. That was the course she pursued.

The fact is, that when the complainant had the intercourse with the defendant, which he now attempts to use as a shield against the consequences of a life of profligacy extending over more than seven years, she could not prove that he had committed a single act of adultery; much less did she know that he had made the same solemn vows of love and loyalty to another woman that he had made to her. She had heard enough to make her suspect that he had been unfaithful to her, but it is entirely certain that she did not know either the extent or the atrocious character of his misconduct. To impute such knowledge to her by presumption would, as it seems to me, be contrary to the lowest notions of justice; the presumption should, according to both reason and justice, be the other way; for, I think there can be no doubt whatever, that had the complainant known the whole truth on May 29th—the full extent of the defendant's apostacy to her—that instead of going to the bed where he lay and submitting to his embraces, she would have fled from him as a polluted being. The fact that she brought this suit, within less than ten days after he turned his back upon her, shows that she did not submit to his em-

braces because she was indifferent to her rights, or insensible to injury. The complainant is entitled to a decree.

The defendant is also before the court on an order to show cause why he should not be adjudged guilty of contempt for disobeying an order requiring him to pay alimony. The proofs are not sufficient to support an order declaring that he has been guilty of willful disobedience, and the order to show cause must, therefore, be discharged.[49]

GARDNER v. GARDNER.

Supreme Judicial Court of Massachusetts, 1854. 2 Gray, 434.

Libel for a divorce from bed and board for extreme cruelty. The libel, which was filed on the 18th of April, 1853, alleged that the respondent, "wholly regardless of his vows and covenants, has treated the libelant with extreme cruelty. He has, without cause, heaped upon the libelant the most vile and opprobrious abuse. He has in the grossest language accused her of the most heinous crimes, of which he knew her to be innocent. He has during their intermarriage, and without provocation, frequently inflicted on the libelant in said Seek-

[49] The doctrine of condonation is derived from the Ecclesiastical Law. Burns' Eccles. Law, tit. "Marriage," § 11; Fisher v. Fisher, 93 Md. 298, 48 A. 833 (1901).

"And it would be injustice to the wife, and immoral in the husband, to claim and enjoy, as his peculiar marital rights, the society of the wife, after knowledge of her offense, and afterwards to cast her off for that same offense. If, therefore, a husband, believing his wife's guilt, will afterwards cohabit with her, whether influenced by his compassion or his affections, or induced by her tears, her penitence, or her fascinations, he cannot afterwards avail himself of that offense to obtain a dissolution of the marriage. And he is bound by his remission, although he after repent of his indulgence, from his subsequent reflections, or from the persuasion of his friends, or from the influence of what he may call the public opinion." Parsons, C. J., in Anonymous, 6 Mass. 147 (1809).

See the following cases in accord with the principal case holding that a full knowledge of the offense is necessary, and that mere suspicion is not enough: Bramwell v. Bramwell, 3 Hagg. Ecc. 618 (1831); Welch v. Welch, 50 Mo. App. 395 (1892); Quincy v. Quincy, 10 N. H. 272 (1839); Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568 (1903); Gosser v. Gosser, 183 Pa. 499, 38 A. 1014 (1898). But condonation may cover unknown acts, if so intended. Moorhouse v. Moorhouse, 90 Ill. App. 401 (1900). If the wife believes her husband's denial, even though a third party would not, her subsequent conduct is not condonation. Andros v. Andros, 1 Cal. App. 309, 82 P. 90 (1905). See the following also, to the effect that condonation is not so readily established against the wife as against the husband: D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773 (1794); Beeby v. Beeby, 1 Hagg. Ecc. 789 (1799); Bowie v. Bowie, 3 Md. Ch. 51 (1850); Wood v. Wood, 2 Paige (N. Y.) 108 (1830), Id., 2 Paige (N. Y.) 454 (1831); Cramp v. Cramp, 89 Law J. P. (N. S.) 119 (1920), semble; Armstrong v. Armstrong, 32 Miss. 279 (1856); Clague v. Clague, 46 Minn. 461, 49 N. W. 198 (1891). In Cramp v. Cramp, supra, Turnbull v. Turnbull, 41 T. L. R. 507 (1925), and Rogers v. Rogers, 67 N. J. Eq. 534, 58 A. 822 (1904), it was held that sexual intercourse amounted to condonation, even though the offense was not forgiven. In California, condonation must, by statute, be by express agreement; cohabitation alone not being sufficient. Hunter v. Hunter, 132 Cal. 473, 64 P. 772 (1901).

onk [where the parties resided] extreme personal violence, and threatened to take her life." * * *

DEWEY, J. * * * 2. The further exception is to the ruling of the presiding judge as to the matter of condonation.

It appears from the bill of exceptions that the latest act of personal violence, alleged to have been committed on the person of the libelant, is stated to have been committed on the 14th of April, 1853; and that the libelant occupied the same sleeping room and bed on the night of that day, but not afterwards; and that this libel was filed on the 18th of April.

The counsel for the respondent insisted that such cohabitation was in law a condonation on the part of the wife of all previous acts of cruelty, and would of itself preclude the maintaining of this libel for divorce. The presiding judge held that this fact must be considered in connection with other facts in the case; and finding from the evidence that, after the night of the 14th of April, and before the filing of this libel, "the respondent by the violence of his conduct caused a reasonable apprehension in the mind of the libelant that she could no longer live and cohabit with him without imminent danger of suffering further extreme cruelty from his assaults"; and that after this violence towards her the libelant did not cohabit with him as her husband. He ruled that such cohabitation on the night of the 14th was not a condonation of all acts of cruelty prior to that night.

It has sometimes been supposed that the doctrine of condonation, arising from continued cohabitation, was inapplicable to cases of libel by the wife, seeking a divorce for extreme cruelty. The cases of Perkins v. Perkins, 6 Mass. 69, and Hollister v. Hollister, 6 Pa. 449, are to that effect. But the better established rule seems to be that cruelty, as well as adultery, may be the subject of condonation. Burr v. Burr, 10 Paige (N. Y.) 20; Whispell v. Whispell, 4 Barb. (N. Y.) 217; Masten v. Masten, 15 N. H. 159; Bishop on Mar. & Div. § 369, and cases cited. The English cases are to the like effect. But Dr. Lushington, in Snow v. Snow, 2 Notes of Cases, Supp. 15, says that the two offenses of adultery and cruelty are so distinct in their nature that the same considerations cannot be equally applicable to both, as respects condonation.

Condonation is not so easily to be inferred against the wife, from her cohabitation, as it might be against the husband. Wood v. Wood, 2 Paige (N. Y.) 108; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; Beeby v. Beeby, 1 Hagg. Ecc. 789. The state of the respective parties differs materially in their opportunities of at once withdrawing from the scene of discord and violence. Forbearance for a season may be not only a justifiable, but a necessary step on the part of the wife; and, when shown to have been so, no condonation for acts of extreme cruelty is to be inferred from such cohabitation.

But any condonation by the wife of cruelty to her on the part of the husband is upon the explicit condition that he will hereafter treat her

with conjugal kindness; and any breach of this condition revives the right to maintain a libel for the original offense. Burr v. Burr, 10 Paige (N. Y.) 20; Bishop on Mar. & Div. § 372. The breach of such condition may be shown, in cases of libel by the wife for cruelty, by evidence which would be insufficient to establish the principal charge. Here words of heat and passion, and any acts of violence in conduct causing a reasonable apprehension of renewed acts of cruelty, would be properly before the court, and might fully answer all grounds of defense arising from alleged condonation. D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; Beeby v. Beeby, 1 Hagg. Ecc. 789.

Such is the rule of law as to condonation; and conceding, what we should by no means admit as a universal rule, that a cohabitation for the single night immediately succeeding the last act of cruelty which was made the ground of a divorce, would per se operate as a condonation, unless such condonation was forfeited by subsequent misconduct of the husband, it is clear, upon the facts found by the presiding judge, whose report as to the facts is to be taken to be correct, and who alone has heard the evidence at large in the case, that the subsequent violent acts of the respondent, within the well-settled principles governing this class of cases, revive the right of the wife to proceed for the original cause for the divorce, and effectually bar the defense of condonation. * * *

New trial refused.

SAYLES v. SAYLES.

Supreme Court of Rhode Island, 1918. 41 R. I. 170, 103 A. 225.

Divorce suit by Ethel D. Sayles against James P. Sayles. Petition granted, and defendant brings exceptions. Exceptions overruled, and case remitted for further proceedings.

See, also, 99 A. 822, 100 A. 246.

VINCENT, J. * * * We think that the record discloses testimony sufficient to support the finding of the trial court that the respondent has been guilty of extreme cruelty, and therefore we cannot say that such finding is wrong.

As the respondent says in his brief, referring to the question of condonation, "We come now to the real and most important consideration involved in this case." It appears that the petitioner signed and made oath to her petition for divorce and for the custody of her children on July 8, 1916; that the same was filed in court on July 11, 1916. The petitioner also filed on the same day, July 11, 1916, a petition for counsel fees, allowance for the support of herself and children, for the custody of her children, and for an injunction restraining the respondent from any interference with her or her children pending the hearing upon her petition for divorce. Citations were issued upon both

petitions and were served the same day, July 11, 1916. The citation issued upon the last-mentioned petition notified the respondent that he might appear before the court on July 15, 1916, and show cause why the prayer of the petition should not be granted; such citation including an ex parte order awarding the petitioner the temporary custody of her children and enjoining him as prayed.

After swearing to her petition for divorce and her petition for allowance, custody of children, etc., on July 8, 1916, the petitioner returned to her home, where she remained until the service of the citations upon said respondent on July 11, 1916, performing her usual household duties and occupying her husband's bed. During this period, however, both parties swear positively that there was no sexual intercourse and that, owing to the temporary physical condition of the respondent, such intercourse would have been impossible. As soon as the citations were served the petitioner left her husband's home and with her children went to the home of her mother. The petitioner does not claim any acts of cruelty subsequent to the date of the petition. The facts in the cause so far as they relate to the question of condonation are not in dispute.

The petitioner denied that in returning to and remaining in her husband's home from July 8th to July 11th she had any intention of condoning his offenses, but that, on the contrary, she was fully determined to prosecute her suit for a divorce, and that had she not been fearful that her husband might do something to deprive her of her children she would not have so returned, but would have gone to her mother's house at once.

"Condonation" is forgiveness. To be effective it must be voluntary and intentional. Such intention may be expressed in words, or it may be implied from the acts of the injured party. In the present case there might be a presumption of sexual cohabitation, and therefore of condonation, from the fact that the petitioner occupied the same bed with her husband for a brief period after the final act of cruelty of which she complains. Such presumption, however, may be rebutted. Wilson v. Wilson, 16 R. I. 122, 13 A. 102; Burns v. Burns, 60 Ind. 259; Danforth v. Danforth, 88 Me. 120, 33 A. 781, 31 L. R. A. 608, 51 Am. St. Rep. 380; Keezer on Marriage and Divorce, § 250.

The testimony is conclusive that no sexual intercourse took place, and therefore any claim of condonation must necessarily be based upon some other ground. All that remains for consideration, upon this question, is the fact that the petitioner attended to her household duties and slept in the same bed with her husband, at the same time intending to go to her mother's house as soon as the service of the necessary papers should secure to her the temporary custody of her children and protect her from the respondent's interference. That such was her real intention is confirmed by her application for the injunction referred to and by her immediate departure from her husband's home on July 11th after service upon him had been made.

It has been held that residing in the same house and even occupying the same room will not effect a condonation if the marital relations were not resumed and there was no intention to forgive the fault. Brown v. Brown, 164 Ill. App. 589; Rudd v. Rudd, 66 Vt. 91, 28 A. 869; Toulson v. Toulson, 93 Md. 754, 50 A. 401. We think that under all the circumstances of the case the petitioner would be likely to fear that her husband might in some way attempt to deprive her of her children should she temporarily leave them in his sole charge, and that such fear would be a sufficient excuse for her action which, not being intended as an expression of forgiveness, would not amount to condonation.

The respondent's exceptions are overruled, and the case is remitted to the superior court for further proceedings.[50]

CHRISTENSEN v. CHRISTENSEN.

Supreme Judicial Court of Maine, 1926. 125 Me. 397, 134 A. 373.

Libel for divorce by Bertha M. Christensen against Christen M. Christensen. Divorce granted, and defendant brings exceptions. Exceptions overruled.

Argued before WILSON, C. J., and PHILBROOK, DEASY, STURGIS, and BARNES, JJ.

50 Continued cohabitation, not under duress or necessity, and with the intent to forgive past acts of cruelty, amounts to condonation, and, if no further cruelty occurs, no divorce can be had. Price v. Price, 127 Ark. 506, 192 S. W. 893 (1917); Davis v. Davis (Mo. App.) 206 S. W. 580 (1918). See Dennis v. Dennis (Mo. App.) 289 S. W. 16 (1926), and Norman v. Norman, 88 W. Va. 640, 107 S. E. 407 (1921), where there was no intent to forgive and no condonation.

Condonation of cruelty is contingent on future kind treatment, and the former cruelty, is revived by the same kind of conduct following the forgiveness. Young v. Young, 323 Ill. 608, 154 N. E. 405 (1926); Deusenberry v. Deusenberry, 82 W. Va. 135, 95 S. E. 665 (1918).

Condoned adultery may be revived by cruelty, so as to be available as a recriminatory defense to the adultery of the other spouse. Fisher v. Fisher, 93 Md. 298, 48 A. 833 (1901), which see for a discussion of the revival of a condoned offense by a marital offense of a different kind. See Copsey v. Copsey, 20 Times Law Rep. 728 (1904), as to whether condoned adultery is revived by desertion.

A condoned offense is revived by conduct which causes a reasonable apprehension of the repetition of the offense. Apgar v. Apgar (N. J. Ch.) 59 A. 230 (1904), condoned adultery revived by conduct which looked adulterous; Totten v. Totten (N. J. Ch.) 60 A. 1095 (1905), same as preceding case, except that the court may have found that the second adultery had been committed; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123 (1897), cruelty; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179 (1904), cruelty. A fortiori, the reviving offense need not be sufficient to constitute an independent ground of divorce. See, in addition to the cases cited, Young v. Young, 323 Ill. 608, 154 N. E. 405 (1926).

In Mikecz v. Mikecz, 95 N. J. Eq. 39, 122 A. 695 (1923), it was held that, where a spouse deserted, was taken back, and again deserted, only the time after the second desertion would count, as the statute required a two-year period of desertion immediately preceding the filing of the suit.

WILSON, C. J. In a libel for divorce, the justice below granted a divorce on the ground of adultery, which was conclusively shown. The only defense was condonation. The case comes to this court on exceptions to alleged rulings of the court below, as set forth in the bill of exceptions: "That the libelant was entitled to a divorce on the ground of adultery," and "that the adultery was, as a matter of law, not condoned."

The real issue is set forth in the alleged ruling "That the adultery was, as a matter of law, not condoned."

"Condonation means the blotting out of the offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed."

The nature and elements of condonation were first fully stated by the English courts in Keats v. Keats, 1 Sw. & Tr. 334, which has been followed by most of the courts in this country.

To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights, after the offense becomes known. While condonation imports forgiveness, the converse is not necessarily true. The offended party may forgive, in that he may not bear any ill will, yet withhold a complete reconciliation in the sense of reinstating the offended to conjugal cohabitation and full marital rights.

The preliminary steps toward reconciliation and ultimate condonation, such as receiving the offending spouse back into the home, as in the case at bar, does not alone constitute condonation, so long as full marital rights are intentionally withheld. 9 R. C. L. 381, § 173; Taber v. Taber (N. J. Ch.) 66 A. 1082; Betz v. Betz, 19 Abb. Prac. (N. Y.) 90; Harnett v. Harnett, 59 Iowa, 401, 13 N. W. 408; Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907, Ann. Cas. 1912C, 1; Talley v. Talley, 215 Pa. 281, 64 A. 523; Rudd v. Rudd, 66 Vt. 91, 28 A. 869; Hann v. Hann, 58 N. J. Eq. 211, 42 A. 564.

Again while evidence of condonation in this state may be introduced without a special plea (Backus v. Backus, 3 Greenl. 136), the burden is on the party setting up the defense to prove it.

Not only was the court, in the case at bar, warranted in finding upon the evidence that the burden was not sustained by the libelee, but condonation is a fact to be proved and found (Taber v. Taber, supra), and, unless the evidence of condonation was conclusive, it cannot be said that there was any error in law on the part of the court below in finding as a fact that condonation was not shown.

Exceptions overruled.[51]

[51] On the other hand, there may be a complete condonation by agreement, though cohabitation be not resumed. Thompson v. Thompson, 49 Nev. 375, 247 P. 545, 47 A. L. R. 569 (1926); Bush v. Bush, 135 Ark. 512, 205 S. W. 895, 6 A. L. R. 1153 (1918).

Letters in affectionate terms, written by the aggrieved spouse to the other, do not constitute condonation. Lundy v. Lundy, 23 Ariz. 213, 202 P. 809

(D) RECRIMINATION

PEASE v. PEASE.

Supreme Court of Wisconsin, 1888. 72 Wis. 136, 39 N. W. 133.

Appeal from circuit court, Ashland county.

COLE, C. J. The plaintiff and appellant brought this action for a divorce from the bonds of matrimony on the ground of adultery committed by the defendant. The wife denied the charge of adultery in her answer, and by way of recrimination, defense, or bar to the plaintiff's action, asked for a limited divorce from the husband on the ground of cruel and inhuman treatment on his part. On the trial of the issue of adultery the jury found against the defendant, and the court found the plaintiff guilty of cruel and inhuman treatment of the defendant, and held that neither party was entitled to a decree of divorce. The sole question before us on this appeal is the correctness of this decision.

Our statute makes adultery and cruel and inhuman treatment of the wife by the husband equally grounds of divorce. Section 2356. The statute places them upon the same ground, attended by the same legal consequences. The cruelty complained of and proven were acts of personal violence on the part of the husband; his striking her in one instance a severe blow in the face with his fist while she was lying in bed, which blow caused a wound that bled freely, and left a bruise for several days upon the face. The circuit court also found other instances proven of violent conduct on the plaintiff's part towards his wife, which in some cases were mitigated to some extent by her improper and exasperating behavior. The evidence is not before us, but we must presume it fully sustained the finding of the court on the facts. So, the simple question presented is, where it is shown that each party has been guilty of an offense which the statute has made a ground for divorce in favor of the other, will the court interfere and grant relief to either offending party? We do not perceive upon what logical principle the court could grant redress to the husband for the adultery of the wife when he himself has been guilty of an offense which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that where one party is shown to have been guilty of adultery such party cannot have a divorce for the adultery committed by the other. Smith v. Smith, 19 Wis. *522. Mr. Bishop says there is an entire concurrence of judicial opinion upon that point both in England and in this country, and that it makes no difference which was the earlier offense;

(1922). A promise to forgive upon the performance of a condition becomes a condonation if the condition is performed. Merriam v. Merriam, 207 Ill. App. 474 (1917). On "condonation of matrimonial offense without cohabitation," see 6 A. L. R. 1157, and 47 A. L. R. 576.

nor even that the plaintiff's act followed a separation which took place on the discovery of the adultery of the defendant. 2 Bish. Mar. & Div. § 80. In the forum of conscience, adultery of the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery—but still the latter has ever been held a bar. And where both adultery and cruelty are made equal offenses, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike and hold one a bar to the other. The following authorities enforce this view of the law where the divorce law is like our own: Hall v. Hall, 4 Allen (Mass.) 39; Handy v. Handy, 124 Mass. 394; Nagel v. Nagel, 12 Mo. 53; Shackett v. Shackett, 49 Vt. 195; Conant v. Conant, 10 Cal. 249; 2 Bish. Mar. & Div. §§ 78–87. See, also, Adams v. Adams, 17 N. J. Eq. 325; Yeatman v. Yeatman, L. R. 1 Prob. & Div. 489; Lempriere v. Lempriere, Id. 569. We therefore think the circuit court was right in holding upon the facts that neither party was entitled to a divorce, because each was guilty of an offense to which the law attached the same legal consequences. But the plaintiff's counsel contends that under section 2360, which provides that in an action for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce (1) when the offense shall appear to have been committed by the procurement or with the connivance of the plaintiff; (2) where the adultery charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties with knowledge of the offense; (3) when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought within three years after the discovery by the plaintiff of the offense charged. As the adultery, he says, was found in the case, but none of the facts set forth in the above three subdivisions were found to exist, therefore the divorce should have been granted. This provision is declaratory of the common law, and gives the trial court discretion to refuse a divorce for adultery where certain things were proven or shown to exist. It might be claimed, in view of the statutory provisions, that the court had no discretion in the matter where the adultery was established, but was absolutely bound to grant the divorce, though there had been connivance of the parties, or condonation, or the injured party had unduly delayed bringing the action after a discovery of the offense. To remove all doubt upon that point the provision was enacted. It was not intended to do away with the general principle that one cannot have redress for a breach of the marriage contract which he has violated by committing a like offense as that of which he complains, but must come into court

with clean hands. This principle still pervades our law, and must be recognized. From these views it follows that the judgment of the circuit court must be affirmed.[52]

APPELTOFFT v. APPELTOFFT.

Court of Appeals of Maryland, 1925. 147 Md. 603, 128 A. 273.

Appeal from the Circuit Court of Baltimore City; Charles F. Stein, Judge.

"To be officially reported."

Suit by Freda M. Appeltofft against Howard E. Appletofft. Judgment for defendant on cross-complaint, and plaintiff appeals. Affirmed.

Argued before BOND, C. J., and URNER, ADKINS, DIGGES, PARKE, and WALSH, JJ.

URNER, J. A bill for a divorce a mensa et thoro, on the ground of excessively vicious conduct, was filed by the appellant against her husband, the appellee, who filed an answer denying the alleged misconduct and also a cross-bill charging the appellant with adultery and praying for a divorce a vinculo matrimonii. The case was heard by the lower court on the oral testimony of the parties and their witnesses, and the trial resulted in a decree dismissing the bill of the wife and granting an absolute divorce for the cause alleged in the cross-bill of the husband. The answer of the wife to the cross-bill neither admitted nor

[52] "On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery, if you are guilty of the same offense yourself.' The received doctrine of compensation would have that effect, because both parties are in eadem delicto; but this is not so in recrimination of cruelty. The delictum is not of the same kind. If the wife was the prior petens in a suit of cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different. The court might not oblige her to cohabitation, which would be dangerous." Lord Stowell in Chambers v. Chambers, 1 Hagg. Cons. 439 (1810).

But see Otway v. Otway, 13 Prob. Div. 141 (1888), where both were guilty of adultery and the husband of cruelty, and it was contended that the adultery canceled itself, and the wife should have a judicial separation for cruelty. The court said that recrimination was not a doctrine of compensation but of "clean hands."

Under an Illinois statute (Smith-Hurd 1927, c. 40, § 11) providing that, if it shall appear to the satisfaction of the court that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed, it is held that desertion cannot be used as a recriminatory defense to adultery. Bast v. Bast, 82 Ill. 584 (1876), which says that the same is true of drunkenness and cruelty. Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192 (1909), so holds as to cruelty. But adultery is a good recriminatory defense to cruelty under this statute. Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 55 L. R. A. 697, 86 Am. St. Rep. 325 (1901). Contra: Buerfening v. Buerfening, 23 Minn. 563 (1877), under a similar statute.

In some states, statutes specifically declare what offenses may be used in recrimination. Stim. Am. St. Law, §§ 6202, 6217.

denied the adultery of which she was accused, but the defense sought to be interposed in the testimony and argument was that the wife is innocent of the offense charged, and that even if she were guilty, her husband's abusive and violent treatment of her, and certain conduct on his part which is said to have encouraged a breach of her marriage vows, constitute a bar to his cross-suit for a divorce on the ground of her infidelity.

Upon the proof in the record we have no alternative but to agree with the conclusion of the court below that the charge of adultery has been sustained. The appellant, while denying the adultery; admitted her acceptance of the affectionate attentions from the man suspected of being her paramour, and he testified specifically to their illicit relations. On one occasion they were discovered and interrupted by a witness while they were in the very act of adultery, according to his testimony. The existence of the compromising situation described by that witness was acknowledged by the appellant; but she asserted that the act was being unsuccessfully attempted against her will. In view of the proved and admitted circumstances, her denial is not convincing. The testimony in the case will not be here reviewed in detail. It leaves no room for reasonable doubt as to the appellant's marital misconduct.

The evidence also proves that the appellee's treatment of his wife was repeatedly brutal and insulting. It would have been a clearly sufficient ground for a divorce a mensa et thoro under the Maryland law if the wife's own conduct had been free of the fault alleged and proved. Her uncondoned adultery, which occurred before the separation, but did not come to the husband's knowledge prior to that event, precludes a decree for a partial divorce on her application. Martin v. Martin, 141 Md. 182, 118 A. 410.

The question as to whether the husband's cross-suit for an absolute divorce is barred by conduct on his part which would have entitled the wife to a decree a mensa et thoro has been determined in the recent unreported case of Pryor v. Pryor (not for publication), decided February 1, 1924. In that case the opinion of the court, prepared by Judge Adkins, contained the following statement:

"By the great preponderance of authorities in this country, where the statutes authorize an absolute divorce or divorce a mensa et thoro, it is fully recognized that in a suit by one spouse for a cause entitling him or her to an absolute divorce, the other spouse cannot plead as a bar in recrimination a cause entitling him or her to a limited divorce. 9 R. C. L. p. 388, § 181; 39 L. R. A. (N. S.) p. 1135, note; Nelson on Divorce and Separation, vol. 1, § 434. There is no express decision on this point in Maryland, but the principle seems to be tacitly recognized in the following cases: Fisher v. Fisher, 93 Md. at page 300; Rasch v. Rasch, 105 Md. at page 507; Green v. Green, 125 Md. at page 143; Geisselman v. Geisselman, 134 Md. at page 462. At any rate there is nothing in these cases which indicates a contrary view."

The opinion was expressed by the court in Foxwell v. Foxwell, 118

Md. 471, 84 A. 552, that a decree of partial divorce at the suit of a wife because of abandonment by her husband would not be a bar to a subsequent suit by him for an absolute divorce on the ground of the wife's adultery which he had not condoned.

In accordance with the decisions we have cited, the contention in this case that the appellee's mistreatment of the appellant prevents a decree of divorce a vinculo matrimonii on the ground of her adultery must be overruled.

The evidence does not give adequate support to the theory of connivance urged in the argument. It was testified by the wife that she once told her husband it was not proper for him to leave her alone in their apartments, above his store, in the company of the visitor who is said to have become her paramour, and that in reply her husband made a remark indicating indifference as to what might occur if she was "not woman enough" to guard herself against the risk of improper advances. There was a positive denial by the husband that he made such a statement. It was mentioned by the appellant as part of a conversation with her husband which occurred, as she testified, more than three years before their separation. The visitor was a young man with whom they had become acquainted as summer boarders at his mother's home in the country. He was a frequent guest at their home in the city during the winter. The charge of connivance is refuted by the appellant's own testimony as to her husband's resentful violence when he suspected that she and the young man referred to had been engaged in flirtation or more serious impropriety. Upon her assurance that she had committed no wrong her husband authorized her to offer the young man his apologies for the suspicion and resentment he had manifested. The proof does not satisfy us that the appellee acquiesced in or permitted the adultery charged against the appellant and the defense of connivance is therefore not available. Barclay v. Barclay, 98 Md. 366, 56 A. 804; Kohloss v. Mobley, 102 Md. 199, 62 A. 236, 5 Ann. Cas. 865; Murrell v. Culver, 141 Md. 349, 118 A. 803.

Decree affirmed, the costs to be paid by the appellee.[53]

[53] In the absence of a controlling statute, it is generally held that any ground for absolute divorce may be used as a recriminatory defense to any other such offense. See Malone v. Malone, 76 Ark. 28, 88 S. W. 840 (1905); Martin v. Martin, 141 Md. 182, 118 A. 410 (1922); Alexander v. Alexander, 140 Ind. 555, 38 N. E. 855 (1894); Day v. Day, 71 Kan. 385, 80 P. 974, 6 Ann. Cas. 169 (1905); and Farber v. Farber, 99 Or. 210, 195 P. 346 (1921).

If the recriminatory defense is desertion, it must have continued for the full statutory period, to be used as a recriminatory defense to adultery. Hall v. Hall, 4 Allen (Mass.) 39 (1862); McCannon v. McCannon, 73 Vt. 147, 50 A. 799 (1901). But observe the doctrine of Pike v. Pike, 100 N. J. Eq. 486, 136 A. 421 (1927), supra, p. 684, and the notes to that case, showing that desertion may, under some circumstances amount to connivance at adultery, or be similarly treated by the courts.

ARNABOLDI v. ARNABOLDI.

Court of Chancery of New Jersey, 1927. 138 A. 116.

See ante, p. 660, for a report of the case.

CUSHMAN v. CUSHMAN.

Supreme Judicial Court of Massachusetts, 1907. 194 Mass. 38, 79 N. E. 809.

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

Libel for divorce by one Cushman against one Cushman. Judgment dismissing the libel, and libelant excepted. Exceptions sustained.

HAMMOND, J. To a libel of the wife for divorce on the ground of adultery the husband filed an answer denying the adultery and setting up by way of recrimination prior desertion on the part of the wife. At the trial the judge found that the husband was guilty of the adultery, but as to the charge of desertion he did not find that the wife's conduct amounted to desertion, although he did find "that there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel," and ordered it to be dismissed. In other words, the wife's charge of adultery was sustained but the husband's charge of desertion was not.

However it may be elsewhere, the rule in this commonwealth is that while the offense set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as in law would be of itself sufficient ground for divorce. Hall v. Hall, 4 Allen, 39; Clapp v. Clapp, 97 Mass. 531; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Walker v. Walker, 172 Mass. 82, 51 N. E. 455, and cases there cited. If upon the evidence the judge had found desertion then, the dismissal of the libel would have been correct; but he did not find it, and there is nothing in the facts found by him as to the conduct of the wife which estopped her from a divorce on the ground of the husband's adultery. This case does not belong to the class of which Lyster v. Lyster,[54] 111 Mass. 327, is a type, where the libelee attempts to justify the charge alleged in the libel (in that case it was desertion) by showing misconduct on the part of the libelant which, though not sufficient in law to constitute a ground of divorce may yet be sufficient in law to justify the act relied upon in the libel. Watts v. Watts, ubi supra. In the case before us a separate and distinct offense on the part of the libelee, having no relation to the offense charged, is set up as a bar to the libel. In such a case, as has been before stated,

[54] Supra, p. 657.

the offense set up must be sufficient of itself to constitute a ground of divorce.

Exceptions sustained.[55]

STORMS v. STORMS.

Court of Chancery of New Jersey, 1906. 71 N. J. Eq. 549, 64 A. 700.

Suit by Jennie Storms against William F. Storms. On petition and cross-petition for divorce. Petition dismissed. Cross-petition granted.

EMERY, V. C. * * * The petitioner being found guilty of adultery, the further question arises whether under the statute a divorce can be granted to the husband, who has himself been guilty of adultery, although this has been condoned. The language of the statute (Divorce Act, Revision 1902; P. L. p. 509, § 22) is: "If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties and done with an intention to procure a divorce (or that the complainant was consenting thereto), or that both parties have been guilty of adultery, then no divorce shall be decreed." The original divorce act of December 2, 1794 (Patterson's Laws, p. 143), contained this clause, and it has since been included as a separate clause in all of the divorce acts. The question is one of statutory construction, and is simply whether "guilty of adultery" in the act means "committed adultery," or whether it means "guilty of" or "chargeable with" adultery, under the divorce act. If an adultery be condoned, a divorce could not be granted, and therefore the party charged with such an adultery could not be found guilty of adultery within the purview of the act, although he or she might be "guilty of adultery," within the meaning of the crimes act, or in the common acceptation of the term. I think the adultery which was characterized in the statute as a guilt, and which was to be a bar to divorce, was an adultery which was a "guilt" or offense, entitling the party injured to a divorce under the act. Chancellor Zabriskie in Jones v. Jones (1866) 18 N. J. Eq. 33, 90 Am. Dec. 607, inclined to this view of the statute; but, as the proofs in that case did not establish the commission of the offense, the decision, although of great weight, cannot be considered as controlling. That adultery condoned is not in itself an absolute bar to a divorce for subsequent adultery by the other spouse is the general

[55] Accord: Bailey v. Bailey, 67 N. H. 402, 29 A. 847 (1893); McCannon v. McCannon, 73 Vt. 147, 50 A. 799 (1901). Compare, however, certain cases where the divorce was sought on the ground of cruelty, and was denied on the ground of the plaintiff's misconduct, which was not of itself a ground for divorce; it appearing that the plaintiff's indiscretions had been a contributing cause to the other party's cruelty. Wiley v. Wiley, 171 Iowa, 390, 151 N. W. 205 (1915); Murrin v. Murrin, 94 W. Va. 605, 119 S. E. 812 (1923).

doctrine of the courts where there is no express statute, and the general opinion of the leading text-writers. Anichini v. Anichini, 2 Curt. Eccl. 210 (Dr. Lushington, 1839); Cumming v. Cumming (1883) 135 Mass. 386, 46 Am. Rep. 476; Fisher v. Fisher (1901) 93 Md. 298, 48 Atl. 833. A contrary view, it is said, would permit a sort of license to commit adultery without punishment to be set up on one side by guilt on the other, however distant in point of time, or however completely forgiven or condoned. In most of the states having statute provisions, the bar of adultery by the party seeking divorce is expressly confined to cases where he or she has been guilty under such circumstances as would have entitled the opposite party to a decree, and decisions under these statutes, unless they be considered declaratory of the previous rule, do not aid in the construction of our statute. Morrell v. Morrell (N. Y. 1847) 1 Barb. 318; Eikenbury v. Burns, 33 Ind. App. 69, 70 N. E. 837; Burns' Ann. St. 1901, § 1045. If, as a matter of statutory construction, the words "guilty of adultery" are held to mean guilty of adultery punishable or actionable under the act, then the court, finding the adultery not to be within the act, has no discretion as to granting a divorce, if the guilt of the other party under the statute be proved. The statute itself prescribes the rule that is to be enforced in cases where both parties are charged with adultery, and in the absence of express provision in the statute giving a discretion to the court, in cases where both parties have in fact been guilty of adultery, it should not be exercised. It is altogether a safer and sounder practice to determine such cases by a certain rule of law prescribed by statute than by a judicial discretion based on the circumstances of each case. Cumming v. Cumming, supra. The difficulties arising under the English matrimonial causes act (St. 20 & 21 Vict. c. 85, § 31), which expressly gives discretion to the court, are pointed out by Lord Penzance in Morgan v. Morgan, 1 Law Rep. Pr. & Div. 81, 38 L. J. Rep. (N. S.) Pr. & Matr. 38 (1869), and subsequent cases, and by Sir James Hanner in McCord v. McCord, L. R. 3 Pr. & Div. 237, 44 L. J. Rep. (N. S.) 38, 30 (1875). * * *

I will advise decree dismissing the petition and for a decree on the cross-petition.[56]

[56] Accord: Jones v. Jones, 71 Colo. 420, 207 P. 596 (1922); Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476 (1883); Storms v. Storms, 71 N. J. Eq. 549, 64 A. 700 (1906); Talley v. Talley, 215 Pa. 281, 64 A. 523 (1906). Cf. Stiehr v. Stiehr, 145 Mich. 297, 108 N. W. 684 (1906).

Even though the recriminatory offense occurs after the commencement of the suit, it is a defense. Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, 74 A. 700, 139 Am. St. Rep. 784 (1909).

In Moors v. Moors, 121 Mass. 232 (1876), a husband who had obtained a provisional decree of divorce, in good faith remarried, and it was held that his cohabitation with the woman he married was adultery and barred his right to a final divorce. See, also, Geisselman v. Geisselman, 134 Md. 453, 107 A. 185 (1919), and Kelsey v. Kelsey, 204 App. Div. 116, 197 N. Y. S. 371 (1922),

SECTION 4.—ALIMONY

OTWAY v. OTWAY.

Arches Court, 1813. 2 Phill. Ecc. 109.

Judgment—Sir JOHN NICHOLL. In this case Mrs. Otway has succeeded in obtaining a sentence of separation from her husband in a suit brought against him for cruelty and adultery.

The question of permanent alimony was reserved, and now comes before the court for its decision, and it is my duty to allot to the wife out of the joint income a fit allowance for her separate maintenance.

The principles upon which the court is to exercise its discretion have been so recently laid down in the case of Cooke v. Cooke [57] (see page 46) that I do not think it necessary to repeat them again at any length.

Undoubtedly a much larger allowance is to be made for permanent alimony than for alimony pending suit; the delinquency of the husband is now established; the wife is the injured party: she is separated from the comfort of matrimonial society, from the society of her family, not by the act of Providence, but by the misconduct of her husband; she must be liberally supported. The law has laid down no exact pro-

reversing (Sup.) 190 N. Y. S. 52 (1921), which hold that good faith is not a reply to the defense of recrimination.

See Pretty v. Pretty, [1911] P. 83, as an illustration of the discretion which the English courts use in applying the doctrine of recrimination.

MISCELLANEOUS NOTE ON DIVORCE.—For the statutes of limitations relating to divorce suits, see Stim. Am. St. Law, § 6223. Long delay, unless explained, will bar a suit, even apart from statutes. Hitchins v. Hitchins, 140 Ill. 326, 29 N. E. 888 (1892); Stuart v. Stuart, 47 Mich. 566, 11 N. W. 388 (1882); Barker v. Barker, 63 N. J. Eq. 593, 53 A. 4 (1902). In Clark v. Clark, 97 Mass. 331 (1867), the defendant committed adultery in 1844, the plaintiff cohabited with her until 1862, when he learned of the adultery, and filed his libel for divorce in 1866. The divorce was granted. Other facts in the case may have had some effect on the decision.

The ground for divorce must exist when the suit is instituted. Tourné v. Tourné, 9 La. 452 (1836). But, under the New York Civil Practice Act of 1920, the plaintiff can file a supplemental complaint showing acts committed after the filing of the original complaint, but supporting the cause of action. Otto v. Otto, 220 App. Div. 130, 220 N. Y. S. 513 (1927). See 36 Yale L. J. 1027, for comment on this case.

The defendant's defense may accrue after the filing of the plaintiff's bill, as, e. g., a recriminatory defense. See supra, p. 705, note 56. In Martin v. Martin, 33 W. Va. 695, 11 S. E. 12 (1890), and Roberts v. Roberts, 99 W. Va. 204, 128 S. E. 144 (1925), it is held that the statutory period of desertion may become complete after the plaintiff's bill is filed, and then the defendant may file a cross-bill on the ground of desertion. Compare, however, Vickers v. Vickers, 95 W. Va. 323, 122 S. E. 279, 41 A. L. R. 266 (1924). On the effect of a previous adjudication, under various circumstances, see Haltenhof v. Haltenhof, 44 Ill. App. 135 (1891); Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223 (1887); Wagoner v. Wagoner, 76 Md. 311, 25 A. 338 (1892); Thurston v. Thurston, 99 Mass. 39 (1868); Miller v. Miller, 150 Mass. 111, 22 N. E. 765 (1889).

[57] 2 Phill. Ecc. 40 (1812).

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portion; it gives sometimes a third, sometimes a moiety, according to circumstances.

In Lord Pomfret's Case the income was £12,000 per annum, the alimony given was £4000. In that case the larger part of the fortune had come from the wife, and there was no family; but he was a peer, and had that rank and dignity to support.

In Taylor v. Taylor (Arches, May 14, 1796) a moiety—in Cooke v. Cooke (Arches, June 25, 1812, see page 40) about a moiety, were given —in these cases there were no children.

In the present case the joint income amounts to £5500 per annum. The greater part of this property came from the wife, the delinquency of the husband is very gross. I should be disposed to give as large a proportion as in any case; if no third parties were concerned, I should give a full moiety, but there are six children, two sons and four daughters, whom the father is bound to maintain and educate; the suitable education for such a family will be a considerable expence; supposing that deducted, the sum I shall allot will give the wife about a moiety of the remainder.

I shall allot £2000 per annum to be paid quarterly from the date of the sentence.

It appears that there are deductions from the estate from two jointures of £1500 each; when they fall in, it will be open to the wife to apply for an increase of alimony.[58]

FISHER v. FISHER.

Court of Divorce and Matrimonial Causes, 1861. 2 Swab. & T. 410.

This was originally a suit for dissolution of marriage at the petition of the wife. The issues were tried before the Judge Ordinary and a jury.

Dr. Phillimore, Q. C., and Mr. R. Pritchard for the wife.

Serjeant Shee and Mr. D. D. Keane for the husband.—Verdict was found for the wife, and on application for some permanent maintenance for her under 20 & 21 Vict. c. 85, s. 32, the JUDGE ORDINARY took

58 See Dean v. Dean, 92 Law J. P. 109, [1923] P. 172, 129 Law T. 704, 67 S. J. 704, 39 Times Law Rep. 602, for observations upon methods of fixing the amount of alimony. "In case of divorce a mensa et thoro, the law allows alimony to the wife; which is that allowance, which is made to a woman for her support out of the husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her estovers; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law de estoveriis habendis, in order to recover it. Manby and Richards v. Scott, 1 Lev. 6 (1658). It is generally proportioned to the rank and quality of the parties. But, in case of elopement, and living with an adulterer, the law allows her no alimony. Cowel. tit. Alimony." 1 Bl. Comm. c. 15, p. 429.

time to consider the circumstances of the case and the proper course to be followed under the above section. Cur. adv. vult.

The JUDGE ORDINARY: This was a petition by a wife for dissolution of her marriage on the ground of adultery, coupled with cruelty. In December of last year a decree nisi for dissolution of the marriage was pronounced.

The petitioner afterwards moved for a decree absolute, and for a provision in the nature of permanent alimony under the 32nd section of 20 & 21 Vict. c. 85. The matter stood over by consent, the respondent undertaking to submit his books to the inspection of some accountant appointed by the petitioner. This was accordingly done, and on the 25th of July the matter was brought on and witnesses were examined on both sides touching the property of the husband and the profits of his business. The clause upon which the court is asked to proceed is in these terms: "The court may, if it shall think fit, on any such decree (i. e. decree declaring the marriage to be dissolved), order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money for any term not exceeding her own life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it, etc., and suspend the pronouncing of its decree till such deed shall have been duly executed." From this latter branch of the section, doubts have been suggested, whether the Legislature intended the provision to extend to cases where the wife is the petitioner; but in two or three instances the court, when consisting of three members, treated it as applicable to such cases, and I cannot doubt that such construction was right, comparing this clause with the 45th, which enables the court, when a divorce is decreed for adultery of the wife, to take from her any property to which she is entitled either in possession or reversion, and order it to be settled for the benefit of the innocent party or the children of the marriage. But whether the power is to be exercised or not is in the discretion of the court, "if it shall think fit," and if it does think fit, the amount to be settled depends also upon the discretion of the court, "so much as it shall deem reasonable."

Certain matters are, by the direction of the Legislature, to be considered by the court in exercising this large discretionary power, viz. the fortune of the wife (if any), the ability of the husband, and the conduct of the parties. Beyond that, no assistance is given by the Legislature, no principle is stated or suggested as applicable to such a case. I have considered the practice of the ecclesiastical court in cases of divorce á mensâ et thoro, and the usual course pursued by the Legislature in cases of divorce bills, without being able to find, in what has been done in either tribunal, any effectual assistance.

I understand that in the ecclesiastical court, when a divorce was decreed at the suit of the husband, permanent alimony was not granted. When the wife was the complaining party, the court granted permanent alimony; and something like a rule as to the proportion of the hus-

band's income to be granted may be extracted from the reported cases. But there she remained the wife of the respondent, and in that character he was bound to maintain her. Alimony, either pendente lite or permanent, is a provision for a wife. In Parliament there have been several cases where it has been thought fit to provide for the maintenance of a delinquent wife after the dissolution of the marriage. Many cogent arguments have been urged against making such provision; nevertheless it may be taken to have been the practice of Parliament to make it; but such cases are inapplicable to the present. The husband elected to have the marriage dissolved, and to be again free from all marital obligations. He therefore was at liberty to take what he asked upon the terms offered.

It may seem hard that, having good grounds for electing to be released from the marriage tie, he should be called upon to provide for the delinquent, but I am not now discussing that question, or the policy of making such provision. I merely point out that such cases differ from the present, the election being there made by the husband; but on another ground they are useless as precedents, for the provision made by the Legislature was not according to any rule or any given proportion of the husband's property. Very few divorce bills were passed at the instance of the wife, and I cannot find any one in which the husband was compelled to make provision for a wife, who elected to be divorced from him. In the present case the wife elects to have the marriage dissolved, and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced á mensâ et thoro. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect, having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the Legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the ecclesiastical court, I must take upon myself the arduous duty of deciding what is reasonable in this case. I consider, then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie.[59] The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain. Under such circumstances I think I ought not to award more than a maintenance. It was stated by counsel that the parties had agreed that the daughter should remain with her mother and be maintained by her; I therefore take that into consideration.

The next point is the period for which the payment to the petitioner

[59] But compare the following expression of the court in Kennard v. Kennard, 81 N. H. 509, 129 A. 725 (1926): "Equity and good conscience require that the husband shall not profit by his own wrong in forcing his wife to divorce him."

shall be continued. Had she been divorced á mensâ et thoro, and had afterwards been herself guilty of adultery, she would have become liable to the loss of her alimony. If hereafter the petitioner should become guilty of immorality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this court and marries again, it would be unreasonable to compel the former husband to maintain her.

I am therefore of opinion, that, so long as the petitioner leads a chaste life and remains sole and unmarried and maintains the daughter, the respondent should pay her an annuity of £100 per annum, payable quarterly, at the four usual feasts; the first payment the next quarter day after decree. In the event of the death or marriage of the daughter, to be reduced to £80. Deed to be prepared by conveyancing counsel to secure the annuity on such fixed property as respondent has, and by his covenant. Daughter to remain in custody of the mother until further order. Costs, except those of examining respondent's books, to be paid by respondent.[60]

[60] In England, prior to the matrimonial Causes Act of 1857 (20 and 21 Vict. c. 85) there was no absolute divorce except by act of Parliament, although annulments were frequently decreed. In granting divorces a mensa et thoro, the ecclesiastical courts gave alimony to the wife, if innocent. But the American courts took the position that the jurisdiction of the ecclesiastical courts to grant divorces did not inhere in the American courts, and that statutes were required to confer such jurisdiction. The question, then, of whether the statutory power to grant divorces carried with it, without express words, the power to decree alimony, was one of difficulty, and special difficulty in the case of absolute divorce, since there was no English precedent for alimony in such cases. In most American states now there are express statutory provisions relating to alimony, so that the only practical importance of the question is as to whether the alimony statutes are exclusive, or may be supplemented by the application of the rules of the ecclesiastical courts. The prevailing view seemed to be that the courts could, without express statutory warrant, give alimony in cases of divorce a mensa et thoro, according to the practice of the ecclesiastical courts, and there was some authority to that effect even in cases of divorce a vinculo. See 60 Am. Dec. at page 667 for the early cases.

Since the enactment of express statutes relating to alimony, the question stated above is frequently intertwined with the problem of construing the particular statute, as to whether it was intended by the Legislature to be exclusive. It has often been held that the statutes are exclusive, but it is not easy to determine whether the decisions involve merely the construction of the statutes, or the question of jurisdiction in the absence of express statutes. See Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389 (1894); State v. Templeton, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234 (1909); Fuller v. Fuller (R. I.) 139 A. 662 (1927); Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136 (1910).

Cf. Lape v. Lape, 99 Ohio St. 143, 124 N. E. 51 (1918); In re Cave, 26 Wash. 213, 66 P. 425, 90 A. S. R. 736 (1901) See, also, note 61, p. 713, infra.

ECKER v. ECKER.

Supreme Court of Oklahoma, 1908. 22 Okl. 873, 98 Pac. 918, 20 L. R. A. [N. S.] 421.

Divorce by Charles L. Ecker against Della Ecker. Plaintiff had judgment for a divorce and the custody of their minor child, but it was decreed that the property should be divided equally between them, or that defendant have judgment for one-half of its value as found by the master, and from such portion of the judgment plaintiff brought error to the United States Court of Appeals of the Indian Territory, whence the cause was transferred, under the Enabling Act, to the Supreme Court of the state of Oklahoma. Reversed and remanded. * * *

HAYES, J. * * * The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute.

The statute governing in this case reads: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Mansf. Dig. Ark. § 2565 (Ind. T. Ann. St. 1899, § 1853).

Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. Reavis v. Reavis, 1 Scam. (Ill.) 242; Deenis v. Deenis, 79 Ill. 74; Spitler v. Spitler, 108 Ill. 120; Edwards v. Edwards, 84 Ala. 361, 3 South. 896; McDonald v. McDonald, 117 Iowa, 307, 90 N. W. 603; Reynolds v. Reynolds, 92 Mich. 104, 52 N. W. 295; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662; Pauly v. Pauly, 14 Okla. 1, 76 Pac. 148; Bishop on Marriage, Divorce and Separation, vol. 2, p. 865; Nelson on Divorce and Separation, vol. 2, p. 907. It is, however, a discretion that a court should at all times exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances.

In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable.

There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce. The evidence is convincing that each has been guilty of cruel treatment of the other and gross immoral conduct, consisting of adultery with different persons. The question whether, upon the evidence in the case and the findings of the master, either party should be granted a divorce, is not before us. The part of the judgment granting a divorce has not been appealed from. The sole question is whether, the divorce having been granted to plaintiff, the court should have granted alimony to defendant.

At the time defendant married plaintiff he had but little property. During their 15 or 16 years of married life, the husband, principally through the thrift, frugality, and industry of the wife, who labored on the farm, and conducted, at different times, a boarding house, restaurants, and kept books in a grocery store, had accumulated property of the value of about $5,000. It is not clear from the record that the beginning of defendant's wrongdoing was not caused by plaintiff's cruel treatment. She is now past the meridian of her life, the greater portion of which she has spent in faithfully laboring in the discharge of her domestic duties and in contributing materially to plaintiff's accumulation of his property. Under these circumstances it is within the discretionary power of the trial court, upon granting to plaintiff a divorce, to allow defendant such alimony as under the circumstances is reasonable, just, and right, taking into consideration the amount of plaintiff's property, the extent to which defendant contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past. But the court ordered an equal division of the property, or that defendant have judgment for one-half of the value of the same. This was error.

Section 2568, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, § 1856), authorizes the court upon rendering final judgment for divorce, to restore each party to all property, not disposed of at the commencement of the action, which either party obtained from or through the other or in consideration or by reason of their marriage. But none of plaintiff's property was obtained by him from or through his wife during their marriage or in consideration thereof. All the property he has is property which he had at the time of his marriage, consisting of one farm, on the purchase price of which he had paid the sum of $400, and on which there was a balance due of $800, and of a small amount of personal property, or that he acquired since their marriage with their joint earnings. Whether courts, under statutes the same or similar to the section quoted above, have authority to decree a gross sum for alimony and maintenance of the wife is a question upon which the courts have divided, but it will serve no useful purpose to review here the two lines of authorities. The Supreme Court of Arkansas, prior to the adoption of this statute in the Indian Territory, had held in Brown v. Brown, 38 Ark. 324,

that the court is without authority to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony, but may decree alimony in a continuous allotment of sums, payable at regular intervals. That case is controlling in the case at bar.

The judgment of the trial court is therefore reversed, and the case remanded, for further proceedings in accordance with this opinion. All the Justices concur.[61]

WILSON v. HINMAN.

Court of Appeals of New York, 1905. 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820.

Action by Mary H. Wilson against Charles N. Hinman. From a judgment of the Appellate Division (90 N. Y. S. 746, 99 App. Div. 41), affirming interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

CULLEN, C. J. This action is brought for the foreclosure of a mortgage. The complaint states that the plaintiff recovered a judgment of absolute divorce against one Balis L. Hinman, by which judgment, as amended, the plaintiff was awarded as alimony the sum of $300 annually "so long as she shall live, to be paid by the said defendant in equal monthly payments"; that said judgment further provided that the defendant in the action should give security for the payment

[61] There are, in most of the states, no fixed rules, either in the statutes or the precedents, with reference to the amount of alimony. Whether or not the wife has need of support, the amount of the estate or earnings of the husband, and the respective degrees of fault of the parties, are important circumstances. Snay v. Snay, 192 Mich. 210, 158 N. W. 858 (1916); Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682 (1925); and Kennard v. Kennard, 81 N. H. 509, 129 A. 725 (1926). See 6 A. L. R. 192, for cases on the earning capacity of the husband as a basis for alimony.

In some states having the community property system there is statutory provision for the division of the community property, upon divorce.

In the ecclesiastical courts, alimony, being for maintenance, was always in periodical payments. But the statutes in many states permit alimony in gross, and in some permit a final division of property between the spouses, upon divorce, as an alternative to alimony payable periodically. See, e. g., Steinkopf v. Steinkopf, 165 Wis. 224, 161 N. W. 757, 1 A. L. R. 1103 (1917), for such a statute. In Greenberg v. Greenberg, 99 N. J. Eq. 461, 133 A. 768 (1926), it was held that, under New Jersey statute alimony in gross could not be decreed, unless the decree was merely a confirmation of an agreement of the parties, which had the approval of the court. Without express statutory warrant, it is generally held that alimony in gross cannot be decreed. See 60 Am. Dec. 668.

In the ecclesiastical courts, the guilty wife received no alimony, and the American decisions are to the same effect, except under statutes in some states which expressly or by implication, permit, in the discretion of the court, an award to her. Her contributions to her husband's property, the degree of her fault and of his innocence, and her necessities, are material circumstances. See Bischoff v. Bischoff, 70 Mont. 503, 226 P. 508 (1924), holding that, under a Montana statute, copied from California, no alimony could be allowed the guilty wife.

of such alimony by the execution and delivery of a mortgage on certain specified real estate; that in pursuance thereof that defendant and the defendant in this action, to whom it is alleged said real estate had been fraudulently conveyed, executed a mortgage to the plaintiff, conditioned for the payment of said alimony to her as long as she should live. The complaint further alleged the death of Balis L. Hinman, the defendant in the divorce action, and that default had been made in the payment of the installments accruing subsequently to such death. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. At the Special Term the demurrer was overruled, and that decision was affirmed by the Appellate Division, from the judgment of which an appeal is taken by certification to this court.

The objection to the maintenance of the action raised by the demurrer is that the obligation to pay alimony ceased with the death of the defendant in the divorce suit, and that is the question we are now called upon to determine. Clearly, at common law, the obligation ceased with the expiration of the life of the husband; but the common law granted no divorce which dissolved the marital tie between the parties, the divorces awarded by the ecclesiastical courts being merely what are known in this country as "separations." Moreover, it is settled law with us that the jurisdiction of courts over divorces is statutory, not inherent, and that the powers of the court are to be determined by the provisions of the statutes. Nevertheless, the principles on which alimony was awarded in the ecclesiastical courts have been generally adopted by the English courts in actions for absolute divorce which have been authorized by recent legislation, and to a certain extent have been followed by the courts of this country. It cannot be denied, however, that on the question whether the obligation to pay alimony survives the death of a husband there is great conflict between the decisions of the courts in the various states, though the preponderance of authority is to the effect that it does not survive. Knapp v. Knapp, 134 Mass. 353; Smith v. Smith, 1 Root (Conn.) 340. This conflict in authority is, as shown by a recent text-writer (Nelson on Divorce, §§ 930, 932), principally occasioned by the differing views entertained by the courts as to the nature of alimony awarded in a decree for absolute divorce under the statutory provisions of the various states. Of course, alimony awarded on the dissolution of a marriage differs in one element from that on a separation. In the latter case the decree merely defines the continuous duty still existing on the part of the husband to support the wife, while in the former the marital obligation is terminated, and the sole liability of the husband towards the wife springs from the decree. In some states, therefore, a judgment of absolute divorce has been considered as a decree settling the property rights of the parties and as a distribution of the assets of the quasi partnership hitherto existing between them (a view in cases justified by the statutory law of the state), while in others alimony awarded by a final decree has been considered as es-

sentially of the same character as the right of support which the wife loses by the dissolution of the marriage. It is the latter view which has been adopted by all the recent decisions of this court. Thus in Matter of Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717, Judge Finch, while holding that a divorced wife could not share in the estate of an intestate, said: "The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife (the right of support to which he had previously alluded) which the divorce cuts off and forbids in the future." In Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, it was held that the alimony awarded to an innocent wife by a decree of divorce in her favor is an allowance for her support and maintenance, the award of which is not the enforcement of a simple debt from the husband, but of his marital obligation of support, from which he would be relieved by the dissolution of the marriage, were it not for the decree. In Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752, the doctrine of the Romaine Case, that alimony is founded upon the marital obligation of support, was reaffirmed, and it was held that a divorced wife was entitled to have the income of a trust fund created for the benefit of her husband applied upon that alimony.

It is true that in two cases (Walker v. Walker, 155 N. Y. 77, 49 N. E. 663, and Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600) we have held that, where a decree of divorce contained no reservation of the right to modify the award of alimony, the court was without power to make such modification, and that the Legislature could not confer that power in the case of decrees entered prior to the enactment of the statute. We there held that the right of the plaintiff was a property right of which she could not be deprived. Those decisions, however, did not proceed on any theory that alimony was merely a debt. They recognized that the foundation for an award of alimony rested in the marital obligation of the husband's support, but held that, the obligation theretofore indefinite having been liquidated by the divorce decree at a specific sum, the adjudication was final. If this view of the nature of alimony be correct, then it seems clear on principle that the obligation to pay it ceases at the death of the husband. A wife's right of support does not survive her husband's life as a claim against his estate. On the death of the husband the wife has her dower in his real estate, if he was possessed of any, and her share in the personalty if he died intestate. The husband, if he choose, may dispose of all his property by will to the exclusion of the wife. It is difficult to see why the rights of the divorced wife should be greater than those she would have enjoyed had she not been divorced. Moreover, there is this practical objection to considering the decree for alimony as surviving the demise of the husband. In this country, at least till very recent times, the class of persons whose income is derived solely from accumulated wealth is comparatively small. The

income of most men is derived from their professional or business exertions, and the award of alimony is usually based on such an income, not on one accruing from accumulated property. An allowance of an amount which it would be entirely just that a man should pay during his life to the wife whom his misconduct has compelled to seek a divorce might be grossly extravagant if imposed as a charge upon his estate after his death, and very unjust to other claimants on his property.

The respondent relies upon the case of Burr v. Burr, 10 Paige, 37, as a controlling authority upon the question before us. The opinion of the chancellor in that case certainly does decide the question in his favor, but we are of opinion that it is not controlling. The case was carried to the Court of Errors and is reported in 7 Hill, 207. The report of the case shows that in the Court of Errors the substantial contest was as to the amount of the alimony, there being in none of the opinions any discussion as to the period during which the alimony should be paid. Moreover, the case arose under a statute different in its terms from the present law. It provided that the court might make decree for the suitable support and maintenance of the wife by the husband, "or out of his property, as may appear just and proper." 2 Rev. St. (1st Ed.) pt. 2, c. 8, tit. 1, p. 147, § 54. Now the provision is that the court may require the defendant to provide for the support of the plaintiff as justice requires. Code Civ. Proc. § 1759. Thus the court is now empowered only to impose a personal obligation upon the defendant. It cannot deprive him of his property, though it may compel him to give security for the discharge of his obligation, to which I shall allude hereafter. Moreover, the authority of Burr v. Burr has been much shaken, if not entirely overthrown, by the recent decision of this court in Johns v. Johns, 166 N. Y. 613, 59 N. E. 1124; affirmed on opinion below 44 App. Div. 533, 60 N. Y. S. 865. In that case a divorced wife brought an action against the executor of a deceased husband to enforce the payment of alimony awarded her by a decree of divorce. It was held that the obligation to pay alimony ceased at the death of the husband and did not survive against his estate. That case can be differentiated from the one before us only in one respect. In the present case the husband was directed to give security for the performance of his obligation, out of which direction sprang the mortgage in suit, while in the Johns Case there was no such direction. On this difference in circumstance there has been founded a doctrine suggested in Galusha v. Galusha, 43 Hun, 181, and apparently adopted by the learned Appellate Division in this case, that a general award of alimony against the husband terminates at his death; but, if he be directed to give security for its payment, it survives. Such a doctrine can rest on no solid foundation. Section 1772 of the Code provides that "where a judgment rendered, or an order made * * * requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also di-

rect him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose." This section does not purport or assume to grant to the wife alimony for any longer period, nor impose upon the husband or his estate any greater obligation than that awarded by the previous provisions of the decree. It is merely security for the performance of the obligation already imposed that the court is authorized to require. It would be an unnatural construction to give it any other effect. The security required might not be in the shape of a lien on any specific property, but merely the personal obligation of sureties. In that case it would hardly be contended that the obligation of the sureties would extend beyond that of their principal. There is nothing in the opinion rendered by Judge Hatch in the Johns Case that supports such a doctrine. On the contrary, the court expressly declined to pass upon the question, as it was not involved in the case. It may very well be that by the agreement of the parties alimony might be awarded in a different form from that provided for in the statute; that is to say, the parties might agree that a gross sum should be paid as alimony, or that an allowance should be made to the wife which would bind the husband's estate after his death. An agreement of that character would in no way contravene public policy, and the performance of it would, doubtless, be enforceable by the courts. It is on this ground that the decision in Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417, proceeded. The present case is barren of any such feature.

The judgments appealed from should be reversed, and the complaint dismissed, but without costs in any court. The question certified should be answered in the negative.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgments reversed, etc.[62]

[62] Divorce a mensa et thoro, such as was granted by the ecclesiastical courts, did not dissolve the marital relation nor affect the rights of the spouses in each other's property, such as the rights of administration and distributive share, dower, and curtesy. But absolute divorce makes the parties strangers, and destroys even inchoate dower. In New York it was held that inchoate dower was a vested right not destroyed by divorce. See In re Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717 (1886). In a number of states, statutes preserve the right of dower of an innocent wife, in lands owned by the husband before the divorce, but do not give her a wife's share in his personal property. See, e. g., Kent v. McCann, 52 Ill. App. 305 (1893); In re Ensign, supra. The effect, then, of the decision in the principal case, is to leave the wife who divorces her husband and has been decreed alimony payable in installments without support, after the husband's death if his property was personal property, no matter how great the amount, even in states which have preserved her right of dower, and without any support whatever in states that have not. Yet the weight of authority is with the principal case. See, 18 A. L. R. 1040. But compare Southard v. Southard, —— Mass. ——, 159 N. E. 512 (1928), and comment thereon in 37 Yale L. J. 994. Arrears of alimony may be collected after the death of either wife or husband. See 2 L. R. A. (N. S.) 242.

LIEN OF ALIMONY DECREE.—Courts generally have the power, and some

have it by express statute, to make a decree for alimony a lien upon the real property of the husband.

EFFECT OF BANKRUPTCY ON ALIMONY.—The discharge in bankruptcy of the husband does not relieve him from the payment of alimony, either as to installments which accrue before or after the bankruptcy. Audubon v. Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. Ed. 1009 (1901). And now, see Wetmore v. Markoe, 196 U. S. 68, 25 S. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265 (1904), applying the amendment of 1903 to the Bankruptcy Act (11 USCA).

EXEMPTIONS AND ALIMONY.—The court can make an alimony decree enforceable against property that is otherwise exempt from execution. See Schooley v. Schooley, 184 Iowa, 835, 169 N. W. 56, 11 A. L. R. 110 (1917).

SPENDTHRIFT TRUSTS AND ALIMONY.—The interest of a husband, the beneficiary of a spendthrift trust, cannot be reached for the purpose of collecting alimony. See Eaton v. Eaton, 81 N. H. 275, 125 A. 433, 35 A. L. R. 1034 (1924); Thackara v. Mintzer, 100 Pa. 151 (1882). But see Hoagland v. Leask, 154 App. Div. 101, 138 N. Y. S. 790 (1912), affirmed without opinion, 214 N. Y. 645, 108 N. E. 1096 (1915), and In re Moorehead's Estate, 289 Pa. 542, 137 A. 802, 52 A. L. R. 1251 (1927), and comments in 76 U. of P. L. Rev. 220, and 41 Harv. L. Rev. 410.

ASSIGNABILITY OF ALIMONY.—Alimony in installments, being for the support of the wife, cannot be assigned nor anticipated by her. See McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074 (1911).

Whether or not a wife, to whom property has been transferred for the support of herself and child, under a decree, can make a valid conveyance of it, depends upon the terms of the decree. See 24 Col. L. Rev. 801, note.

POWER OF COURT TO MODIFY DECREE.—The ecclesiastical courts modified alimony decrees in divorces a mensa et thoro, if circumstances had changed; Cox v. Cox, 3 Add. 276 (1876); and that power has been exercised by American courts, in cases of such divorces, even without statutory warrant. See 60 Am. Dec. 668. But in cases of absolute divorce there is no power to modify the decree in the absence of statutory authority to do so. Sampson v. Sampson, 16 R. I. 456, 16 A. 711, 3 L. R. A. 349 (1889); Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 129 Am. St. Rep. 477, 19 L. R. A. (N. S.) 245 (1908). And a statute, purporting to give courts the power to modify such decrees rendered before the statute was passed, is unconstitutional. Fuller v. Fuller (R. I.) 139 A. 662, (1927); Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903). But most states have statutes giving the courts power to modify alimony decrees. Even under such a statute, however, if there was no alimony decree whatever at the time of the divorce, because the defendant husband was out of the jurisdiction and was served only by publication, the court could not later, upon personal service, decree alimony, for there was nothing to modify. Kelley v. Kelley, 317 Ill. 104, 147 N. E. 659 (1925). See, also, the following paragraph.

POWER TO DECREE ALIMONY AFTER DIVORCE.—There is an interesting conflict of authority upon the question of whether, where a divorce has been decreed upon constructive service upon the defendant spouse, the wife can later, in the same jurisdiction where the divorce was granted, or in another jurisdiction, secure an award of alimony. Some cases draw a distinction between the cases where the wife was plaintiff in the original action and those where she was the defendant, served only by publication. Hutton v. Dodge, 58 Utah, 228, 198 P. 165, (1921), contains an excellent discussion.

EFFECT OF REMARRIAGE UPON ALIMONY.—The remarriage of the wife does not automatically terminate her alimony, but is a ground for the husband's application to have it terminated or modified. The remarriage of the husband may, if the necessities of his new family require it, cause the court to reduce his first wife's alimony. See 42 A. L. R. 602.

EFFECT OF SUBSEQUENT ADULTERY OF WIFE.—If the divorce is a mensa et thoro only, the subsequent adultery of the wife is a ground for modification or termination of her alimony. Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930 (1901). But, if the divorce is absolute, the subsequent misconduct of the wife does not affect her alimony. Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811 (1892).

EFFECT OF RECONCILIATION OF THE DIVORCED PARTIES.—If the divorce is a mensa et thoro, their reconciliation, without remarriage, restores the marital

WESTERFIELD v. WESTERFIELD.

Court of Chancery of New Jersey, 1882. 36 N. J. Eq. 195.

On petition, depositions and master's report.

VAN FLEET, V. C. The bill in this case is filed for maintenance, under the twentieth section of the statute concerning divorces. The complainant is now before the court asking for alimony pendente lite, and counsel fees. * * *

An application for alimony pendente lite stands now solely on the ground of necessity. Originally such allowances were made, in divorce suits, almost as a matter of course. At common law, by the marriage contract, the husband acquired complete control over all property owned by his wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife, and to furnish her with the means of prosecuting her suit or defending his, she would be left, during the litigation, both destitute and defenceless. She was, therefore in almost all cases regarded as a privileged suitor, who had a right to call upon her adversary for both support and the means required to carry on the litigation on her part. * * *

status and generally terminates alimony, but it has been held that the reconciliation may, like condonation, be conditional on good conduct, and alimony may be revived by the husband's misconduct. See 40 A. L. R. 1239.

HUSBAND'S RIGHT TO ALIMONY.—In the ecclesiastical courts, and in this country, a husband is not entitled to alimony, in the absence of express statutory provision. Only a few states have made such provision. See Jacobson v. Superior Court for Spokane County, 120 Wash. 359, 207 P. 227, 24 A. L. R. 488 (1922). Some statutes provide for the restoration to either spouse of all property received from the other by reason of the marriage. Pleasnick v. Pleasnick, 215 Ky. 281, 284 S. W. 1070 (1926).

METHODS OF ENFORCING THE PAYMENT OF ALIMONY.—A decree for alimony is for most purposes enforceable in the same ways that any other decree for money is available. See 102 Am. St. Rep. 702. If it is subject to modification, however, it cannot be sued upon at law. Nixon v. Wright, 146 Mich. 231, 109 N. W. 274, 10 Ann. Cas. 547 (1906). Punishment for contempt is a common method of enforcement. See 137 Am. St. Rep. 881. Present inability to pay does not purge the husband of contempt for previous failure to pay at a time when he had the ability. Snook v. Snook, 110 Wash. 310, 188 P. 502, 9 A. L. R. 262 (1920). Courts sometimes use a fine as a method of compelling the payment of alimony. Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491, 14 A. L. R. 712 (1921). Imprisonment for contempt for failure to pay alimony is not, of course, a violation of constitutional prohibitions of imprisonment for debt. Ex parte Davis, 101 Tex. 607, 111 S. W. 394, 17 L. R. A. [N. S.] 1140 (1908). In some jurisdictions a writ of ne exeat may issue to prevent an alimony decree from becoming ineffective. Ex parte Grbic, 170 Wis. 201, 174 N. W. 546, 8 A. L. R. 325 (1919).

ALIMONY WHEN MARRIAGE IS ANNULLED.—Where a marriage is annulled, the wife has no right to alimony. Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50 (1890). Contra: Strode v. Strode, 3 Bush (Ky.) 227, 96 Am. Dec. 211 (1867). But, if the supposed marriage was a fraud upon the wife, or if she had assisted in the accumulation of property, the court may compensate her for the wrong, or reimburse her. See Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.(2d) 582 (1928); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079, 126 Am. St. Rep. 900 (1908); also 76 U. of P. L. Rev. 439. As to temporary alimony in annulment cases, see Vroom v. Marsh, 29 N. J. Eq. 15 (1878), infra, p. 723.

The doctrine that a wife is not now of right, and independent of the fact that she has a sufficient separate estate, entitled to temporary alimony, is as well supported by authority as it is by reason. Chancellor Williamson, in Marker v. Marker, 11 N. J. Eq. 256, after stating the general rule that in actions for divorce the wife is a privileged suitor and entitled to counsel fees and alimony, says: "The rule originally rested upon the principle that the husband having by the marriage contract the control of the wife's property, she was destitute of the means of her own protection. The statute has changed the common law, and secures to the wife the ownership and disposition of property she may have at her marriage or may acquire afterwards. When the wife is a suitor in court, the question will be, whether she has property independent of her husband, and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the husband and wife." Mr. Bishop, in the second volume of his treatise on Marriage and Divorce, at section 394, says: "When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either." And Judge Rapallo, in delivering the judgment of the court of appeals of New York, in a recent case, says: "If the wife has sufficient means of her own, temporary alimony is not allowable. * * * The fact that a wife is destitute of means to carry on her suit and to support herself during its pendency, is as essential as any other fact, to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity." Collins v. Collins, 80 N. Y. 1.

It is plain, I think, if the rule just stated is applied, that this application must be denied. The wife has nearly three times the income her husband has. Her income is quite sufficient to afford her a comfortable support, and also to pay such legal expenses as it will be necessary for her to incur in the prosecution of her suit. There is, therefore, no necessity whatever that she should have additional aid. * * * The application must be denied.

WALLMAN v. WALLMAN.

Supreme Court of Nevada, 1924. 48 Nev. 239, 229 P. 1, 35 A. L. R. 1096.

Suit for divorce by Harry M. Wallman against Catherine C. Wallman. From a decree for defendant, and an order denying a new trial, plaintiff appeals. On motion by defendant for allowance of attorney's fees for defense of suit in Supreme Court, and expenses incurred in taking depositions in trial court, and for stay of proceedings. Granted as to attorney's fees, and proceedings stayed until compliance with order.

COLEMAN, J. This suit was instituted by Harry M. Wallman to procure a divorce from his wife, Catherine C. Wallman. We will allude to the parties as plaintiff and defendant, as they were designated in the district court.

The parties intermarried in the state of New Jersey. The plaintiff, having established his residence in this state, instituted this action for a divorce. The defendant appeared and contested the action. Judgment and decree were entered in her favor. From the judgment, and an order denying a motion for a new trial, the plaintiff has appealed.

In apt time the defendant appeared in this court and made a motion for the allowance of attorney's fees in the sum of $200 for services to be rendered in defending the suit in this court, and for the payment of a further sum to pay expenses incurred by the defendant in the taking of depositions in her own behalf which were used in the trial court. Defendant also asks that an order be made staying these proceedings until such order as may be made is complied with.

In support of the motion the defendant filed and read upon the hearing several affidavits tending to establish the financial status of the respective parties. She recites that she resides in Newark, N. J.; that she has no money nor property, and no financial resources; and that she is dependent upon her own labor for a livelihood; and that she is earning only $64 per month. She further states that the plaintiff is a professional musician, and when residing in New Jersey earned $60 per week as such; that he is able-bodied and capable of earning a good salary; that the plaintiff deserted her in December, 1922, since which time he had contributed nothing to her support or maintenance; that, at that time, he had in his possession $1,000; that she desires to employ Evalyn Gregory, an attorney at law, to present her defense in this court, and that $200 is a reasonable fee to be paid for such services; and that she is wholly without means to pay for the service of an attorney.

Appellant filed counter affidavits to the effect that, at the time his affidavit was executed, he was out of employment and had been out of employment since March, 1924, and that his total earnings for the 12 months prior to the making of the affidavit aggregated the sum of $269.10; that he has no other means, and that he is unable to borrow any money whatever, and that he is in debt to the amount of $1,450; and that he is unable to pay the amount asked for, or any sum whatever, as attorney's fees to the defendant. There are other affidavits and counter affidavits, but we do not deem it necessary to allude to them.

In considering the motion, we must bear in mind that the husband instituted the suit in the trial court and is the appellant in this court, and that the defendant was brought into the case against her will. Suffice it to say that we think it appears from the affidavits that neither of the parties has any means of any consequence. That the plaintiff was at the time of filing his affidavit out of employment, and that the defendant was barely earning a living for herself.

Where the husband is the plaintiff in a suit for divorce, poverty on his part is no ground upon which to resist an application for suit money, since he must either furnish his wife with funds with which to make her defense, or submit to stay of proceedings in the action. In Cairnes v. Cairnes, 29 Colo. 260, 68 P. 233, 93 Am. St. Rep. 55, it was said:

"In this connection it may be well to state, however, that, when a husband desires the luxury of a divorce from his wife, he should be compelled to pay the expenses of his wife pending the litigation; and, in cases where the wife is a nonresident of the state, if she desires to come to the state of Colorado to make a defense, she should be given an opportunity to do so, and the courts should require plaintiff to deposit in court a sum sufficient to pay the expenses of the wife from her home to the state of Colorado, to be paid to her upon her arrival here within a reasonable time, with such additional sum as may be necessary to properly defend the suit. And in case the plaintiff is unable to make reasonable provision for his wife during the pendency of the suit, the suit should be abated until he is able to do so."

The Court of Appeals of Missouri, in Mangels v. Mangels, 6 Mo. App. 481, said:

"If the husband is plaintiff, and cannot furnish his wife with the means of defending his suit, he is not entitled to a decree. Purcell v. Purcell, 3 Edw. Ch. 194. That the husband has no visible estate is not a sufficient ground for refusing to the wife a proper allowance for necessary expenses of the suit."

In discussing this question it was said in Deemer v. Deemer, 7 Pa. Co. Ct. R. 554:

"As to her husband's ability to furnish the means for her, it is immaterial whether he has the ability or not. If he has the ability the wife is protected by an order in her favor. If he has not the ability and he is, as here, the libelant, we accomplish virtually the same end by making the allowance and suspending the proceedings until he becomes of sufficient ability to pay it. Schireman v. Schireman, 2 Max. 25, 7 Pa. C. C. R. 110."

Such is the rule in New York. We quote from Cohen v. Cohen, 11 Misc. Rep. 704, 32 N. Y. S. 1082:

"A careful consideration of the papers submitted satisfies me that the plaintiff is absolutely without means; but his poverty is no defense to the application. Hallock v. Hallock, 4 How. Pr. 160; Frickel v. Frickel, 4 Misc. Rep. 382, 24 N. Y. S. 483. He must, in an action of this character, either furnish the wife with the money to enable her to make her defense, or abandon the action. Purcell v. Purcell, 3 Edw. Ch. 194. Great injustice might be done if the husband were not compelled to furnish to his wife the means of having so important a question of fact as is involved in this action decided in the usual manner. Hallock v. Hallock, supra. It is proper, however, to take into consid-

eration the pecuniary ability of the husband, and the circumstances in life of the parties, in fixing the amount of the allowance."

To the same effect, 19 C. J. 236, § 554.

Counsel for the plaintiff does not contend that the sum of $200 is not a fair and reasonable fee for defending the suit in this court.

We have no authority in this proceeding to make an order for the payment of the expense incurred in taking depositions in the trial court. That was a matter entirely in the jurisdiction of the trial court, subject to review on appeal.

It is ordered that the plaintiff pay to the clerk of this court for the benefit of the defendant as an attorney's fee the sum of $200, and that proceedings herein be stayed until this order is complied with.

DUCKER, C. J., and SANDERS, J., concur.[63]

VROOM v. MARSH.

Court of Chancery of New Jersey, 1878. 29 N. J. Eq. 15.

Bill for decree annulling marriage. On petition for temporary alimony and counsel fee.

THE CHANCELLOR. This is an application for alimony pendente lite and counsel fee. The complainant files his bill for a decree annulling the marriage between him and the defendant. He, of course, admits a marriage de facto. He alleges that he was compelled, by duress, to enter into the contract. The fact that he is before this court denying the validity of the marriage, and in this proceeding seeking to annul it, is not, of itself, enough to relieve him from the support of the defendant pendente lite; for, as before stated, he admits that there was a de facto marriage, which is still subsisting. North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. The defendant, by her answer, denies any participation in, or knowledge of, the alleged duress, or of the existence of it; but declares that she understood at the time that the marriage was wholly voluntary on the part of the complainant. There will be an allowance of five dollars a week for ad interim alimony, with a counsel fee of one hundred dollars.

[63] The rule of the principal case is followed even where the husband is an infant. Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568 (1890).

If the wife is the plaintiff, the husband's inability to pay suit money and temporary alimony is a defense. See the note to the principal case, 35 A. L. R. 1099. There may be an allowance to the wife for counsel fees to prosecute an appeal in a divorce action. Enders v. Enders, 34 Idaho, 381, 201 P. 714, 18 A. L. R. 1492 (1921).

Even though the parties to the suit are reconciled while the suit is pending, counsel to whom a fee has been allowed will get it. Yoder v. Yoder, 105 Wash. 491, 178 P. 474, 3 A. L. R. 1104 (1919).

A husband is not entitled, except by statute, to suit money or temporary alimony. Groth v. Groth, 69 Ill. App. 68 (1896).

CHAPTER 4

SEPARATION WITHOUT DIVORCE

SECTION 1.—SEPARATE MAINTENANCE BY DECREE

LANG v. LANG et al.

Supreme Court of Appeals of West Virginia, 1912. 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129.

Appeal from Circuit Court, Harrison County.

Bill by Susan C. Lang against George W. Lang and others for alimony. Decree for defendants, and complainant appeals. Reversed and remanded.

ROBINSON, J. May a court of equity, independently of proceedings for divorce, decree alimony or maintenance to a wife who has been deserted by her husband? The appeal in the case before us concretely presents this question. The bill is brought by a wife whose husband deserted her to live with another woman. The wife seeks alimony or maintenance, but no divorce, from the husband. The court below held that equity would not entertain such case. The bill was dismissed on demurrer.

In Chapman v. Parsons, 66 W. Va. 308, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. Rep. 1033, we noticed the question now presented, but reserved answer thereto. Now that it is squarely before us, we must answer the same in the light of reason and authority.

We hold that equity has jurisdiction to decree alimony or maintenance to a wife, independently of our divorce statutes. Out of the great contrariety of opinion on the point, we choose that which seems best to accord with reason and justice. Indeed we adopt the view which is now recognized by the current of authority in the United States, whatever may be said in some of the older encyclopedias and text-books. An extended critical examination of the subject convinces us that the courts of this country have so rapidly accepted the view which we now approve that the weight of authority is in its favor, though only a few years ago the writers generally announced that the weight was the other way.

A most recent work, collecting all the adjudicated cases on the subject and announcing a text therefrom, says: "In the United States it is maintained, by much authority, that in the absence of legislation to the contrary, alimony should not be allowed in an independent suit in courts of equity. The proper remedy, at common law, where the hus-

band deserted his wife and refused to supply her with necessaries according to her rank and condition, was an action at law by the person supplying such necessaries for her. But in many of the states alimony may be decreed independently of any proceeding for separation or divorce where the husband refuses to support his wife, or where she has separated from him, on the ground that in the absence of adequate relief or remedy at law, equity will interfere; and in other states where the rule was formerly that an independent action would not lie, it is now held that such an action will lie although no statute authorizes it. The inherent right of equity to entertain an action for alimony apart from any proceeding for divorce is not taken away by a statute authorizing the granting of alimony in an action for divorce, or by a statute making it a misdemeanor for a person willfully to neglect to provide support for his wife." 3 Enc. L. & P. 65. Then, showing that the trend of legislation has followed the reason and justice of a suit for maintenance without divorce, the same text proceeds: "In nearly all the states where the authority of courts to award alimony independently of divorce was denied at common law, statutes now exist authorizing an independent action for alimony, with limitations in some instances; and in several jurisdictions where the common-law authority of equity courts to award alimony without divorce is recognized, statutes now exist which are declaratory of the common law. In other states, where the common-law authority to award alimony without divorce has not been passed upon, statutes now exist authorizing the awarding of alimony in an independent action."

It is not our purpose in this opinion to treat of the subject in an original manner. Indeed we could not do so more ably than has been done by many courts and eminent text writers. That which we should say in justification of a well grounded jurisdiction in equity for alimony without divorce would only be repetition of what has been written time and again. That equity has such jurisdiction because of the want of an adequate remedy at law, we are satisfied. That the recognition of such jurisdiction has met the approval of most eminent minds, there can be no doubt. That the reasons for such recognition are sound, is made clear by a reading of the authorities. 2 Nelson on Divorce and Separation, §§ 1000–1003; 2 Story, Equity Jurisprudence, § 1423a. Some of the older cases are: Glover v. Glover, 16 Ala. 440; Galland v. Galland, 38 Cal. 265; Butler v. Butler, 4 Litt. (Ky.) 202; Garland v. Garland, 50 Miss. 694; Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. St. Rep. 667. The doctrine finds favor in new jurisdictions, by interesting opinions in the following: Bueter v. Bueter, 1 S. D. 94, 45 N. W. 208, 8 L. R. A. 562; Bauer v. Bauer, 2 N. D. 108, 49 N. W. 418; Kimble v. Kimble, 17 Wash. 75, 49 P. 216; Edgerton v. Edgerton, 12 Mont. 122, 29 P. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557; Dole v. Gear, 14 Hawaii, 554. For collections of the cases generally, see: 3 Enc. L. & P. 66; 2 Amer. & Eng. Enc. Law, 94; 14 Cyc. 744.

"The broad ground upon which these authorities rest is, that it is

the duty of the husband to support the wife, and if, without fault upon her part, he refuses to do so, the courts will compel him to render her a reasonable support in accordance with his means, even though the wife does not seek or wish a legal separation dissolving the bonds of matrimony, and that an action for this purpose may be maintained, because of the inadequacy of ordinary legal remedies to enforce this duty. Again, the policy of the courts is to discourage, rather than encourage, divorces. The wife may be entitled to a divorce, but whether or not she will exercise that right is optional with her, and to hold that unless she did she could not maintain an action for support would be both unreasonable and unjust, for, although the conduct of the husband may be such that she could dissolve the marriage contract, he is not relieved from his duty of supporting her because she does not wish to pursue that course, and, besides, a case might arise where the husband withheld support, but not for a sufficient length of time to entitle the wife to a divorce upon that ground, and in the interim she would be without an adequate remedy, unless permitted to maintain an action for separate maintenance." In re Popejoy, 26 Colo. 32, 55 P. 1083, 77 Am. St. Rep. 222.

But there is direct Virginia authority on the subject. "In Virginia, not only is alimony granted as incidental to divorce of either kind, with the largest discretion as to the estates of the parties, but it may be granted by the court of chancery, independently of any divorce, or any application for one, as where the misconduct of the husband drives the wife from her home, or he turns her out of doors, or perhaps wherever a divorce from bed and board, or a restoration of conjugal rights would be decreed had they been asked for." 1 Minor's Inst. (4th Ed.) 308. A Virginia chancellor was perhaps the first to promulgate this doctrine. Purcell v. Purcell, 4 Hen. & M. (Va.) 507. Judge Tucker says the decision in that case is sound. Tucker's Com. book 1, ch. 9, page 101. Justice Story cites it and says: "There is so much good sense and reason in this doctrine, that it might be wished it were generally adopted." 2 Equity Jurisprudence, supra. The doctrine was again affirmed in Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781. It is distinctly recognized in the opinion in Latham v. Latham, 30 Grat. (Va.) 307. Judge Johnson seemingly approves it in Stewart v. Stewart, 27 W. Va. 167. We have observed that Mr. Minor, in the last edition of his great commentaries, considered it the law of Virginia. Yet, the argument is made that the Purcell and Almond cases must be distinguished because there were no divorce statutes in Virginia when these cases were instituted. No such reason is given for the opinion in either of the cases. Plainly in them, equity was accorded jurisdiction on the ground that the wife had no adequate remedy at law to secure—not a divorce—but the maintenance due to her from the husband. These decisions are binding authority in this jurisdiction. We have already indicated that we have no disposition to overthrow them.

Our divorce statutes do not contain a word that either expressly or

impliedly takes away the right of a wife to sue for maintenance without divorce. Those statutes grant the right to divorce—a thing entirely different from the right to mere maintenance. The latter right belonged to a wife long before the divorce statutes were passed. How the granting of an entirely different right can exclude the exercise of one already vouchsafed we cannot readily conceive. In this connection, the following is pertinent: "But there is no provision of the statute which authorizes an application for alimony, except in connection with a prayer for divorce; and it is claimed on behalf of the defendant, that, inasmuch as provision is made for the allowance of alimony only on an application for divorce, it was the intention of the Legislature to limit the power of the court to grant alimony to that class of cases. The maxim 'expressio unius est exclusio alterius' is invoked as applicable to this proposition. But, in my opinion, it has no application to the case. The main subject-matter of the statute was the regulation of divorce; and only as incidental to that subject the statute prescribes the power of the court in respect to alimony in that class of cases. The Legislature was dealing with the general subject of alimony, as an independent subject-matter of legislation; but, only, as one of the incidents of an application for divorce. It saw fit to define the power of the court over the allowance of alimony on an application for divorce; but was not considering the subject of alimony on any other class of cases." Galland v. Galland, supra. See, also, an able discussion of the same point in Edgerton v. Edgerton, supra.

The venue of a suit for maintenance without divorce is in no wise controlled by the statute in relation to jurisdiction in divorce suits. The place of suit is governed by the laws applying to ordinary suits for the vindication of legal or equitable rights. The divorce statutes do not relate to an independent suit for maintenance and cannot control it.

Some minor grounds of demurrer to the bill are assigned, but they are plainly untenable. They call for no discussion here. Nor are cross-assignments of error, relating to the validity of the attachment proceedings, well taken. They must be overruled.

Pursuant to the foregoing observations, the order of the circuit court sustaining the demurrer and dismissing the bill will be reversed, the demurrer to the bill will be overruled, and the case will be remanded to be further proceeded in.[1]

1 Where the wife obtains a decree for separate maintenance in one state, and the husband later secures a divorce in another state, the question arises whether the prior decree for maintenance is still effective. See Simonton v. Simonton, 40 Idaho, 751, 236 P. 863, 42 A. L. R. 1363 (1925).

SECTION 2.—SEPARATION AGREEMENTS

COLLINS v. COLLINS.

Supreme Court of North Carolina, 1867. 62 N. C. 153. 93 Am. Dec. 606.

[Petition for dower stating facts essential to give a right to dower, and the further fact that the plaintiff and her husband had lived apart pursuant to articles of agreement under which she had agreed to accept, in lieu of dower, a certain sum secured by bond.]

READE, J. It is to be considered for the first time, whether a deed of separation between husband and wife, will be enforced in this court.

The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics—its oneness—"they shall be no longer twain but one flesh," "to live together after God's holy ordinance," "so long as they both shall live." But little legislation is necessary to define and regulate it. We know it by intuition. It is induced by the strongest passion of the human soul, love. It is the most endeared relation which nature makes, or society forms. When lusts entice, or wealth prompts the relation, it may prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in perfect freedom. There are no constraints of parents, of custom or of laws; nor any influences but such as are conducive to its happiness. It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven; their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but, together—the nursery of morality and piety; and the bulwarks of society.

How different from this is marriage, quarrel, separation!—the anomalous condition of a husband without a wife, a wife without a husband, parents without children, and children without parents! Such relations too surely follow deeds of separation. Let it be understood that marriage is only an experiment, to be formed inconsiderately, and broken capriciously; to be put on and off like a garment; that husband and wife may have separate establishments, in which to nurse their hate, and cover their irregularities; that chil-

dren may be trained to hate one parent or both, and to have the care of neither; and society to have constantly in view the nuisance of their infidelities; and what greater evil can be imagined.

It is to be admitted, that in some of the old governments, passions and vices have fixed this evil upon society. It was unknown to the common law. Roper, in his treatise on Husband and Wife (2d vol. p. 267), says: "This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated, that, as in the other innovations upon that law, so in this instance, the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities. According to the original policy of England, the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties, by voluntary compact, to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in courts of law and equity, that a separation in pais is in effect valid, and that while it continues, the wife is to be considered, in most respects, as a feme sole."

Since this evil has attached to English society, learned Judges have strongly condemned it; but too much property now depends upon it to disturb it. * * *

If there were any doubt as to our policy it would seem to be clearly settled by our legislation. Important as the relation is, our whole legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble except for impotency at the time of marriage, or subsequent infidelity. It allows separation only where the wife's condition is intolerable, or life burdensome. And it allows separate support only where the husband is a drunkard or spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases the parties are not allowed to be the judges; but they must make application to court, and so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being freed and separated from each other—observe, separated from each other.

In contravention of this policy, and in disregard of their marriage vows, the parties in this case had "difficulties" and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them, and each relinquished to the other all the marriage privileges and responsibilities, and were to live separately. Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice. It is true that the courts will not compel them to live

together; but it is equally true that they will afford them no encouragement to separate, except in those cases provided by law.

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one, to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties toward a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.

We do not know the facts of this case, except that it seems that the wife was induced to take less than she is now satisfied with, or than the law allows her.

We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court.

The demurrer is overruled with costs.

PER CURIAM. Demurrer overruled.[2]

COMMONWEALTH v. RICHARDS.

Supreme Court of Pennsylvania, 1890. 131 Pa. 209, 18 A. 1007.

CLARK, J.[3] This is a proceeding under the act of April 13, 1867 (P. L. 78), brought by Emma Richards against her husband, Thomas Richards, to obtain an order upon him for her maintenance and support. The complaint is that on September 20, 1887, the defendant, residing in Allegheny City, "did then and there, without any cause or provocation, desert and abandon" his wife and since that day "has failed and refused to provide anything toward her support and maintenance." At the trial in the Quarter Sessions the defendant offered in evidence a deed of voluntary separation dated March 11, 1886, by the terms of which the parties, "in view of divers disputes and unhappy differences" which had arisen between them, had consented and agreed to live separate and apart from each other during their natural lives, etc. The husband agreed to, and actually did, place in the hands of his wife, "towards her better support and maintenance," the sum of $50 in cash, household goods to the amount of $100, and

[2] Accord: Foote v. Nickerson, 70 N. H. 496, 48 A. 1088, 54 L. R. A. 554 (1901), which contains an extended discussion of the English and American authorities by Peaslee, J. See, also, Judge Peaslee's article on the subject in 15 Harv. L. Rev. 638.

Compare with the principal case of Collins v. Collins, however, Sparks v. Sparks, 94 N. C. 527 (1886), and see Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D, 261 (1912), as to the effect of a statute upon the public policy of the state upon this question.

[3] The statement of facts is omitted.

four shares of stock in the Co-operative Foundry of Beaver Falls, Pa., of the par value of $100 each. In consideration thereof the wife agreed to discharge the said Thomas Richards, his heirs and assigns, and his estate, from all claims, etc.; the husband to have the custody of their child, William Emmett, etc. The question as to the effect of these articles of separation is brought upon the record by a formal bill of exceptions, and, as no question is raised as to the disposition of the case on a certiorari, we will consider it as the parties have presented it.

That a valid agreement may be made for separation between a husband and wife, and for an allowance for her support, where the separation is inevitable and immediate, is now too well settled to admit of discussion or require a citation of authorities. The validity of such covenants, although exceptional in their status, has been established by repeated decisions of this court. Ordinarily these agreements, as in Dillinger's Appeal, 35 Pa. 357, have been carried into effect through the medium of a trustee; but the undoubted weight of authority is that there may be a valid agreement for the separation directly between husband and wife, without the intervention of a trustee, which the courts will sanction. Hutton v. Hutton, 3 Pa. 100; Smith v. Knowles, 2 Grant, Cas. 413; Hitner's Appeal, 54 Pa. 110; Garver v. Miller, 16 Ohio St. 527; Randall v. Randall, 37 Mich. 563; Dutton v. Dutton, 30 Ind. 452. In such cases the husband himself will be treated as a trustee for the specific purpose in view, and will be held accordingly. If the object of the agreement is actual and immediate, if the terms are reasonable, and it is actually carried into effect by both parties in good faith, it will be as binding upon the wife as upon her husband.

In the case at bar, we do not understand that there is any allegation of fraud or unfairness, or that the terms of the deed of separation were, in any respect, unreasonable. How, then, under such circumstances, can the husband, upon the complaint of the wife, be convicted of a crime in failing to do what he was under no legal obligation to do? Can his wife, after having by a formal deed bound him to permit her to live separate and alone, and absolved him from her maintenance, immediately thereafter enter a criminal complaint, and procure his arrest and conviction, for doing what she had bound him both in law and in equity to do? The proceedings are not under the act of 1836, but under the act of 1867; they are instituted by the wife, not by the children or by the overseers of the poor; and it is difficult to see how the wife, in such case, could at the same time hold her husband to perform the articles, and convict him of a crime for doing so. The absurdity of such a result is apparent. If the prosecution were in behalf of the children, or by the overseers of the poor, a question would be presented which it is not necessary now to discuss. Certainly a husband, as between himself and his wife, cannot be said to have separated himself from her without reasonable cause,

when she has by deed placed him under legal obligation "not to visit her, or to enter any house where she may happen to be," and "to permit her to live separate from him," and to carry on business on her own account as if she were a feme sole.

If a proper provision has been made for a wife, her husband is not liable even for necessaries furnished for her support. Cany v. Patton, 2 Ashm. 140; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297. And a party dealing with a married woman, known to be living apart from her husband, is put upon inquiry as to the cause of the separation. If this be so, for much stronger reasons will the husband, under such circumstances, be relieved from a criminal prosecution, instituted by the wife herself, to obtain an order for her maintenance.

If the deed of separation was fraudulently procured and the terms were unreasonable, or if after its execution it had become null and void by the acts of the parties, these facts should have been shown; but, standing upon the deed alone, the conviction was unwarranted by the proofs, and must be set aside.

The judgment is therefore reversed, and a procedendo awarded.[4]

LEAMING, Vice Chancellor in DEVINE v. DEVINE (Court of Chancery of New Jersey, 1918) 89 N. J. Eq. 51, 104 A. 370:

"But an important radical difference is to be found between the English law and that of this jurisdiction, which appears to invade the very foundation of the decisions above cited, and further renders them inapplicable to our conditions. In England the contract of a husband and wife to live apart is not restricted by law to the period of their mutual assent, and the contract can be specifically enforced; either spouse, if without wrong, may by force of the contract maintain a bill to restrain the other from an action for the restitution of conjugal rights. See Besant v. Wood, L. R. 12 Ch. Div. 605, and cases there cited. In New Jersey separation agreements have no such force. Here married persons may agree to live separate and apart from each other, because it is their privilege to live in that manner so long as they mutually desire to do so, and the husband's agreement to support his wife during that period of time is in harmony with his lawful duty; but an agreement of separation cannot confer on either party the right to live away from the other against the will of the other. Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 A. 926; Mockridge v. Mockridge, 62 N. J. Eq. 570, 50 A. 182. By policy of the law the period for which they thus contract touching their separation is limited to the period of their future mutual assent to live apart. Accordingly, in the absence of wrongdoing on the husband's part, he

[4] The validity of separation agreements is now almost universally recognized. See, however, Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848 (1907):

may require his wife's return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will deny to her any right to support from him, notwithstanding the existence of an agreement wherein they have mutually stipulated to live apart. Moores v. Moores, 16 N. J. Eq. 275; Power v. Power, 65 N. J. Eq. 93, 55 A. 111; Power v. Power, 66 N. J. Eq. 320, 58 A. 192, 105 Am. St. Rep. 653.

The wife's act of adultery while living separate from her husband pursuant to the terms of a separation agreement is thus operative to deny to her husband the right to require her return to him— a right preserved to him by our law—unless he condones an act which he is under no legal or moral obligation to condone. And the legal obligation of a husband to support his wife exists only so long as she shall remain chaste (Bradbury v. Bradbury, 74 Atl. 150), unless it shall be held that the burden of the agreement for support contained in a separation agreement survives that period.

It thus appears that in this jurisdiction, unlike England, the period of operation of the stipulation to live apart, however broadly expressed, cannot lawfully be extended or contemplated as intended to extend beyond the time when either party shall withdraw assent; that the husband's withdrawal of assent to the separation brings into existence the duty of the wife's return; that her failure to return denies to her the right to further support, so far as the stipulations of the agreement touching her right to live away from her husband are concerned; that her adultery in like manner denies to her the right to further support, so far as the stipulations of the agreement touching her right to live apart from her husband are concerned. Accordingly the absence of a limitation as to time or event in the provisions of the agreement touching support, if held to entitle the wife to support notwithstanding her unlawful refusal to return, nor notwithstanding her adultery which denies to her the right to return, must be deemed to relate to and include circumstances and conditions which the law does not permit the parties to contemplate in their stipulations touching their right to live apart. As the agreement to live apart necessarily reserved to both parties the right to withdraw from that engagement at any time without such right being expressed in the agreement, it would seem that the stipulation touching support, contained in the same agreement (which stipulation in such circumstances clearly contemplates separate domiciles which render the stipulated periodical payments for support necessary), must be understood as operative only within the legitimate field of operation of the primary stipulations of the agreement touching separation. So closely related are the engagements for living apart and for support that any appropriate recognition of established rules of construction appears to require that in a single instrument they should be read together and understood as dependent and coextensive in their operation and force; the termination of the contractual force of the engagement for

separate domiciles should thus terminate the obligation contemplating and based upon the existence of that condition. The absence in the English law of this limitation upon the rights of the spouses to contract touching the period of their separation appears to impel the conclusion that the decisions of that jurisdiction are inapplicable to conditions here present. Moreover, any assumed contemplation of the parties that a virtuous wife may fall from virtue attributes to a virtuous woman an almost impossible and wholly unreasonable conception, and attributes to the husband a contemplation so unnatural and so at variance with the field of privilege which the law extends that the implied condition of chastity seems necessarily present in such agreements." [5]

[5] In Whittle v. Schlemm, 94 N. J. Law, 112, 109 A. 305, 8 A. L. R. 1447 (1920), the holding in Devine v. Devine, 89 N. J. Eq. 51, 104 A. 370 (1918), that a dum casta clause would be implied in a separation agreement, was overruled, on the ground that the common-law duty of the husband to support his wife continued in spite of her adultery until he divorced her. The great weight of authority is in accord with the latter view.

A provision in a separation agreement, by which one spouse gives up all rights in the property of the other, such as dower, inheritance, administration, etc., is valid if the agreement is otherwise valid. See Girard v. Girard, 79 N. M. 189, 221 P. 801, 35 A. L. R. 1493 (1923). But, if the parties later become reconciled, and the circumstances show an apparent intent to abrogate the terms of the agreement, it is no longer binding. Fowler v. Fowler, 119 Okl. 95, 248 P. 629 (1926); Logan v. Logan, 141 Wash. 62, 250 P. 641 (1926).

It is, of course, a common provision in separation agreements that the wife gives up all right to be supported by her husband except as provided in the agreement. This term of the agreement is usually held enforceable, and the wife cannot recover more, Hayden v. Hayden, 215 Ky. 299, 284 S. W. 1073 (1926); Melson v. Melson, 151 Md. 196, 134 A. 136 (1926). But, if the agreement includes a provision for a child, and the amount proves inadequate, a court may increase the amount for the child. However, in Van Koten v. Van Koten, 322 Ill. 323, 154 N. E. 146, 50 A. L. R. 347 (1926), the court held that a separation agreement, the principal provision of which was the waiver by the wife of any support from her husband, was completely void as against public policy.

The separation agreement is invalid, unless the separation has already taken place, or is immediately impending. Day v. Chamberlain, 223 Mich. 278, 193 N. W. 824 (1923); Dowie v. De Winter, 203 App. Div. 302, 197 N. Y. S. 54 (1922); Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453 (1889); note in 27 Col. L. Rev. 99. An agreement for future support in case of separation was sustained as a part of a reconciliation agreement in State v. Smith, 6 Greenl. (Me.) 462, 20 Am. Dec. 324 (1830).

The terms of a valid separation agreement are not abrogated by a subsequent divorce, nor can they be modified by an alimony decree without the consent of the parties. Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. Rep. 453 (1889).

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